E 8-40

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887

No. ~~1402.~~ 991

THE UNITED STATES EX REL: OSCAR DUNLAP,
PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 2, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1402.

THE UNITED STATES EX REL: OSCAR DUNLAP, PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Petition for mandamus	1	1
Order referring cause to General Term	14	8
Judgment dismissing petition	15	8
Order fixing amount of bond	16	9
Bond	17	10
Writ of error	18	10
Citation	18	10
Proof of service of writ of error and citation	19	11
Certificate to record	20	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 12, 1888.

1 *Petition for Mandamus. Filed Dec.* 19, 1887.

In the Supreme Court of the District of Columbia, the 19th day of December, 1887. At Law.

THE UNITED STATES *ex relatione* OSCAR DUNLAP
vs.
JOHN C. BLACK, Commissioner of Pensions. } No. 28324.

To the honorable the chief justice and the justices of the supreme court of the district of Columbia:

The petition of your relator, Oscar Dunlap, respectfully represents—

1. That he is a citizen of the United States and of the Territory of Dakota and resides in the town of Grand View, Douglas county, in said Territory, and brings this suit in the name of the United States, for and in his own behalf, for the writ of mandamus against the respondent.

2. That the respondent, John C. Black, is also a citizen of the United States and of the State of Illinois, is the Commissioner of Pensions, and as such is sued.

3. And your relator alleges that during the late civil war he was in the military service of the United States and held the rank of captain and commanded Company "I," 26th Illinois Volunteer Infantry; that while in said military service and in line of duty he sustained, December 28, 1864, such wounds and injuries as resulted at the time thereof in the amputation of his right arm below the elbow and right leg below the knee, and at the same time he
2 sustained a terrible head injury, namely, the fracture of the skull and left jaw, resulting in epilepsy and the permanent impairment of his mind and memory, whereby he became and now is so totally and permanently disabled as to be rendered utterly helpless, or so nearly so as to require regular aid and attendance of another person.

4. And your relator says that his said combined disabilities are much greater than results from the loss merely of both hands or both feet, and much greater than the law requires in any case to entitle an applicant for pension to be rated therewith in the first class; and he further says that the law provides for his said disability a pension of $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4th, 1874, and $72 per month from June 17th, 1878.

5. But your relator alleges that the Pension Office, under the administration of the predecessors of the respondent, granted to your relator a pension only for the loss of his right hand and right foot by certificate No. 66419, and rated him therefor at $20 per month from date of discharge; $24 per month from June 4, 1872, and $36 per month from February 28, 1877, and no allowance whatever was made for the greater disability resulting from the injury to the head as aforesaid.

6. And your relator further says that by reason of his said head

injury and resulting epilepsy his mind and memory were so permanently impaired that he has never been able since the incurrence of said injury to retain scarcely more than a momentary recollection of transpiring events; and he says that, although he has no recollection at all as to what the fact is, he is informed he never made application for pension on account of his said head injury, combined with the loss of the right hand and right foot, until the time hereinafter mentioned; but he does aver that
3 the record and the proofs on file clearly show from the beginning the injury to his head, as well as the loss of his right hand and right foot, and his utterly helpless condition on account of these combined disabilities requiring regular aid and attendance of another person.

7. And your relator further says that he is informed and believes and so avers that by reason of his failure or the failure of those persons who were engaged to act in his behalf to make such application for a pension for and on account of his entire disabilities resulting as well from his said injury to the head as from the loss of his right hand and right foot the Pension Office, under the respondent's predecessors, granted to your relator a pension only for the loss of the right hand and right foot, which were particularly specified as the cause of the disability for which pension was claimed.

8. And your relator further alleges that by reason of his said head injury and the results thereof of epilepsy and the permanent impairment of his mind and memory as aforesaid his case is unaffected by any limitations of the pension laws, which expressly save and reserve from their operation the cases of minors under sixteen years of age and persons whose minds and memories are so permanently impaired, as is the case of your relator, as to render them incapable of making valid contracts or of transacting business. Therefore, as your relator alleges, the fact that for a series of years he omitted or neglected to apply for a pension on account of his said head injury cannot militate against him, nor is his right to such pension in any manner barred by the limitations of the pension laws on account of such omission or neglect.

4 9. But your relator says that through friendly advice he did make a formal application to the Pension Office on June 26th, 1880, for pension on account of his said head injury, as well as for and on account of the loss of his right hand and right foot, and since that date your relator has had and now has a claim pending before the Pension Office for pension on account of these combined disabilities.

And your relator alleges that the act of Congress (commonly called the arrears of pension act) entitled "An act to provide that all pensions on account of death or wounds received or disease contracted in the service of the United States during the late war of the rebellion which have been granted or which shall hereafter be granted shall commence from the date of death or discharge from the service of the United States, for the payment of arrears of pensions and other purposes," approved January 25th, 1879, and as amended by the act of March 3, 1879, provides as follows:

"That the rate at which the arrears of invalid pensions shall be allowed and computed in the cases which have been or shall hereafter be allowed shall be graded according to the degree of the pensioner's disability from time to time and the provisions of the pension laws in force over the period for which the arrears shall be computed.

That section one of the act of January twenty-fifth, eighteen hundred and seventy-nine, granting arrears of pensions, shall be construed to extend to and include pensions on account of soldiers who were enlisted or drafted for the service in the war of the rebellion but died or incurred disability from a cause originating after the cessation of hostilities and before being mustered out: Pro-
5 vided, That in no case shall arrears of pensions be allowed and paid from a time prior to the date of actual disability.

SEC. 2. All pensions which have been or which may hereafter be granted in consequence of death occurring from a cause which originated in the service since the fourth day of March, eighteen hundred and sixty-one, or in consequence of wounds or injuries received or disease contracted since that date shall commence from the death or discharge of the person on whose account the claim has been or is hereafter granted, if the disability occurred prior to discharge; and if such disability occurred after the discharge, then from the date of actual disability or from the termination of the right of party having prior title to such pension: Provided, The application for such pension has been or is hereafter filed with the Commissioner of Pensions prior to the first day of July, eighteen hundred and eighty, otherwise the pension shall commence from the date of filing the application; but the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under sixteen years of age.

SEC. 3. Section forty-seven hundred and nine of the Revised Statutes is hereby repealed."

And your relator says that, having filed his application therefor with the Commissioner of Pensions prior to the first day of July, 1880, he is entitled to arrears of pensions under and by virtue of said act, amended as aforesaid, from the date of his discharge, according to the degree of his entire disability and the provisions of the pension laws in force from time to time over the intervening period; and he says that he was discharged from the military service of the United States May 15, 1865, and that he is
6 entitled to a pension from May 16, 1865, and, holding the rank of captain at the time he sustained his said wounds and injuries, his pension was never less than $20 per month, but he says the pension laws provide that the rate of pension for a disability requiring aid and attendance of another person shall be from June 6, 1866, $25 per month; from June 4, 1872, $31.25 per month; from June 4, 1874, $50 per month, and from June 17, 1878, $72 per month, and he avers that he is entitled to the difference monthly between these sums and what has been allowed him, and that the said arrears of pension act was passed by Congress for such purpose, to enable him and all pensioners in like situation with himself to

claim and to receive arrears of pension, provided claim be made prior to July 1, 1880.

10. And your relator further says that his said application coming on to be considered by the respondent, as Commissioner of Pensions, and for his official action and decision thereon, the respondent found and ruled that your relator is now, and has continuously been since his discharge, so disabled from his said wounds and injuries as to require regular aid and attendance of another person. The respondent in the discharge of his official duties as Commissioner of Pensions made the following adjudication in your relator's said case, namely:

Certificate No. 66419. *Oscar Dunlap, Co. I, 26th Illinois.*

Ruling No. 222.

DEPARTMENT OF THE INTERIOR,
BUREAU OF PENSIONS,
WASHINGTON, D. C., *October* 15, 1887.

In this case the application of the claimant for rerating and for increase will be allowed at $50 per month from May
7 25, 1881, and the date of the first medical examination under claimant's application, of June 26, 1880. This rating is allowed under the act of June 18, 1874, it sufficiently appearing by the evidence in this case that the claimant has lost both a hand and a foot and at the same time has been so additionally injured in the head as, from a period prior to the rerating or increase in this case, to render him totally and permanently helpless, requiring from thence until now the regular personal aid and attendance of another person.

The reason why the claimant's rating is not advanced to $72 per month is that he was not, on the 16th of June, 1880, receiving pension at the rate of $50 per month, nor was he entitled to receive a pension of $50 per month at that date, for the reason that, while the degree of helplessness which has been shown was that contemplated by the law, the claimant himself (neither on his own motion nor under the guidance of those who are legally responsible for his actions in this claim) has not made application to be rated in pursuance of the act of June 18, 1874, but, on the contrary thereof, had asked to be rated and had been rated at $36 per month, under the act of February 28, 1877.

Such application for increase was made by him April 30, 1877, and an allowance of $36 was made to him under said application May 24, 1877.

It should be noted that in this application the claimant did not refer to his injuries of head, and only referred to and stated the loss of his hand and his foot, clearly intending to avail himself of the provisions of the act of February 28, 1877.

This was his view, as evidenced by the fact that he received the pension under this certificate, without questioning or demur-, at the rate provided in said act, acquiescing in the decision of the office in the issue of the certificate aforesaid.

8 It thus appears that the first time at which rating should have been made to the claimant under the act of June 16, 1880, or the acts which it amended was, as before stated, at the date of the filing of his application for increase, dated June 26, 1880, and, under the law as now and then existing, the earliest date at which rerating and increase could have been allowed him, if at all, under said act, was the date of the first medical examination had after the filing of his application.

The date of this medical examination was May 25, 1881; at that time he should have been rated, according to the testimony then on file (which has been greatly strengthened by testimony since added), at the rate of $50 per month, and the failure to do so was manifestly a failure upon the part of the office, and a rerating will be ordered in conformity with this ruling, the Commissioner holding in this, as in other cases, that to entitle to the benefits of the act of June 16, 1880, even under the construction given to that act in the case of Whitehead, dated July 12, 1881, by Secretary Kirkwood, there must have been not only the right to pension, but that right itself must have been operative by the act of the pensioner asserting his claim.

JOHN C. BLACK,
Commissioner.

Recorded in vol. 2, p. 136, Commissioner's Rulings.

11. And your relator says that thereupon the respondent caused the said pension certificate of your relator to reissue at $50 per month from May 25, 1881, but refused to grant arrears of pension from date of discharge or to comply with the requirements of the law in that behalf.

And your relator further says that the respondent has thus
9 expressly found the facts in your relator's case to be: (1) that while your relator was in the military service of the Unites States and in the line of duty he sustained such wounds and injuries as resulted in the loss of his right hand and right foot and at the same time sustaining injury to the head; (2) that your relator was thereby rendered "totally and permanently helpless, requiring from thence till now the regular aid and attendance of another person;" and (3) that your relator applied to the Commissioner of Pensions on June 26, 1880, for pension on account thereof.

And your relator says that upon this finding of the facts whether he is entitled to a rerating and an increase of pension from date of discharge so as to give unto him a pension commensurate with his disabilities so found to exist by the respondent is a question of law, and that it does not lie in the discretionary power of the respondent, as Commissioner of Pensions, to deny or in anywise abridge his rights with respect thereto.

And your relator further says that his is a case under the arrears of pension acts aforesaid, and that having filed with the Commissioner of Pensions his claim within the express terms of that act amended as aforesaid, he is entitled to arrears of pension for his entire dis-

ability, as found to exist by the respondent as aforesaid, from the date of his discharge and according to such rate as is provided by the provisions of the pension laws covering the intervening period; and he avers that for the precise disability the respondent, in the discharge of his official duties and in the exercise of his judgment and discretion in all the premises, has found your relator to now have and to have continuously had since his discharge, to wit: That
10 your relator is so disabled from the loss of his right hand and right foot and so additionally injured in the head as "to render him totally and permanently helpless, requiring from thence till now the regular personal aid and attendance of another person;" is expressly pensioned at $25 per month from June 6, 1866, by the provisions of section 4697, Revised Statutes of the United States; at $31.25 per month from June 4, 1872, by the provisions of section 4698, Revised Statutes of the United States; at $50 per month from June 4, 1874, by the provisions of the act of June 18, 1874, and at $72 per month from June 17, 1878, by the provisions of the act of June 16, 1880; and he further avers that upon such adjudication by the respondent he is entitled to be so pensioned by the express provisions of the arrears of pension act, amended by the act of March 3, 1879, as aforesaid; and your relator further avers that the said adjudication, so made as aforesaid by the respondent in discharge of his official duties and the exercise of his judgment and discretion as Commissioner of Pensions, has been ratified and confirmed by the honorable Secretary of the Department of the Interior, evidenced by your relator's said certificate reissued as aforesaid and signed by the acting Secretary and countersigned by the respondent as Commissioner of Pensions and sealed with the departmental seal, which said certificate your relator prays leave to exhibit and read to the court at the hearing of this petition.

And your relator further says that every and all the reasons or pretended reasons given by the respondent in his said adjudication of your relator's claim why he cannot grant full arrears of pension and an increase to $72 per month to your relator are wholly
11 irrelevant and invalid in the law; and he avers that it was and now is wholly immaterial whether he was on the pension roll at all or not on June 16, 1880; that to have made his claim within the time prescribed by the arrears of pension act amended as aforesaid, to wit, before July 1, 1880, is enough to entitle him to arrears of pension from date of discharge under the law; that the date, May 25, 1881, of the alleged medical examination in his case has no legal significance at all, nor has any of the other alleged reasons of the respondent for his refusal to discharge the plain legal duties imposed upon him as Commissioner of Pensions by the laws aforesaid any significance whatever in the case. The language of the law is couched in simple and plain terms, declaring that your relator, whose claim therefor was filed with the Commissioner of Pensions on June 26, 1880, shall be entitled to arrears of pension from date of discharge. The only condition thereby imposed is that such claim shall be filed with the Commissioner of Pensions before July 1, 1880.

12. And your relator further says that at the age of nineteen years he was enrolled a private in Company I, 26th Illinois Volunteers, on November 8, 1861, and was mustered, together with his company, into the United States service January 15, 1862; that he was then sound in body and mind; that by his good soldierly conduct he was rapidly promoted through the grades of non-commissioned officers, and was, in April, 1863, appointed and commissioned second lieutenant; was further promoted to first lieutenant in April, 1864, and was finally promoted, in September, 1864, to the rank of captain of the company in whose ranks he had enlisted a private less than three years before; that at the time he sustained his wounds and injuries, December 28, 1864, he was on special duty by order of Major General Wm. T. Sherman as military conductor in charge of trains running over the railroads used by General Sherman's army in its military operations; that while he was in the discharge of such duties he was, by an accident, thrown from the foot rail of the moving train, on which he was standing, with great violence to the ground; his right hand and foot, falling across the rail, were crushed by the wheels of the moving train, necessitating amputation at the wrist and ankle, and at the same time he sustained a severe blow on the head, resulting in the fracture of the skull on the left side and the fracture of the left jaw; that he was thence removed to the hospital, where he lay for months in an entirely unconscious condition on account of this head injury, which is now and has ever since been the cause of a greater disability to him than results from the loss of his right hand and right foot; that it resulted in epilepsy and the almost total destruction of his memory; that by this head injury alone he now is and always has been, since June 6, 1866, entitled to be rated in the first class, as requiring regular aid and attendance of another person, within the meaning of the law. There are numerous cases on the pension rolls so rated for similar head injury with similar results; but he says that this terrible head injury, coupled with the loss of the right hand and right foot, has reduced him to a degree of helplessness that is without a parallel on the United States pension rolls, saving only the case of Henry D. Fuller, certificate No. 59194, who, by the explosion of a single shell, lost the sight of his right eye, left arm at the shoulder joint, left foot, and sustained shell wound of right leg, between the knee and ankle, resulting in compound comminuted fracture of bone
13 and a sloughing wound that has never healed, which, if any difference exists, is worse than that of your relator; and your relator says there is not nor has there ever been since his said injury any medical question at all in his case; that his utterly helpless condition, both of body and mind, is as apparent to one person as another; and he avers that, while he is within the terms of the arrears of pension act as to date of filing his claim for pension on account of his said head injury, the limitations of the pension laws do not apply and have never applied to his case; that the Legislature has taken the precaution to exempt from the operation of the limitation of the statutes all persons who are insane, *non compos*

mentis, or who are so mentally deranged, from any cause, as to be rendered incapable in law to make valid contracts or to transact business. There is no limitation nor bar to your relator's claim on any ground whatever.

Wherefore your relator prays as follows:

That the peremptory writ of mandamus may issue out of this honorable court, directed to the respondent, commanding him, as Commissioner of Pensions, to forthwith reissue your relator's said pension certificate, with the following rates, namely: $25 per month from June 6, 1886; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, first deducting all sums that have been paid him, and to do and perform whatever the law requires to be done in all the premises; and to this end your relator will ever humbly pray.

OSCAR DUNLAP.

J. G. BIGELOW,
Solicitor for Relator.

14 TERRITORY OF DAKOTA, } ss:
Lincoln County, }

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the facts therein stated of my own knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

OSCAR DUNLAP.

Subscribed and sworn to before me this 14th day of December, 1887.

D. H. HAWN, [SEAL.]
Judge of Probate, Lincoln County, D. T.

Referred to the general term of this court.

W. S. COX, *J.*

15 *Court Proceedings.*

Proceedings before supreme court of the District of Columbia, sitting in general term, commencing fourth Monday, January 23, 1888.

Present, presiding: Chief Justice Edward F. Bingham, and Alexander R. Hagner, Charles P. James, and William M. Merrick, associate justices.

MONDAY, *January* 23*d*, 1888.

By order of the justices presiding the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

TUESDAY, *February* 21, 1888.

Session resumed pursuant to adjournment.
Present: Justices Bingham, James, and Cox.

* * * * * * *

THE UNITED STATES *ex relatione* OSCAR DUNLAP
vs.
JOHN C. BLACK, Commissioner of Pensions. } At Law. No. 28324.

For mandamus.

This cause coming on to be heard upon the motion of the relator for a rule on the respondent to show cause, and counsel having been heard thereon, it is thereupon, on due consideration thereof,
16 this 21 day of February, 1888, by the court ordered, adjudged, and decreed that the motion be, and the same hereby is, overruled; and it is further ordered, adjudged, and decreed that the petition be, and the same hereby is, dismissed.

E. F. BINGHAM,
Chief Justice.

* * * * * * *

TUESDAY, *March* 8, 1888.

Session resumed pursuant to adjournment.
Present: Chief Justice Bingham and Justices James and Cox.

* * * * * * *

THE UNITED STATES *ex relatione* OSCAR DUNLAP
vs.
JOHN C. BLACK, Commissioner of Pensions. } At Law. No. 28324.

For mandamus.

The petitioner in this cause having sued out a writ of error to the Supreme Court of the United States on the final judgment of this court dismissing the petition, the bond is fixed in the penalty of one hundred dollars.

By the court:

E. F. BINGHAM,
Chief Justice.

17 In the Supreme Court of the District of Columbia, the 8th day of March, 1888.

THE UNITED STATES *ex relatione* OSCAR DUNLAP
vs.
JOHN C. BLACK, Commissioner of Pensions. } No. 28324.

In error.

Know all men by these presents that we, Oscar Dunlap, Ira Gordon, and Charles R. Miller, are bound unto the above-named John C. Black, Commissioner of Pensions, in the sum of one hundred dollars, to be paid to the said John C. Black, Commissioner of Pensions, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 8th day of March, 1888.

Whereas the above-named Oscar Dunlap, relator, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Oscar Dunlap, relator, shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

OSCAR DUNLAP, [SEAL.]
By J. G. BIGELOW, *His Att'y.*
IRA GORDON. [SEAL.]
CHARLES R. MILLER. [SEAL.]

Sealed and delivered in presence of—
J. G. BIGELOW.

Approved:
E. F. BINGHAM,
Chief Justice.

[Endorsed:] Filed Mar. 9, 1888. R. J. Meigs, clerk.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between the United States *ex relatione* Oscar Dunlap and John C. Black, Commissioner of Pensions, being No. 28324, at law, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears, and it being fit that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby

commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 9th day of March, in the year of our Lord 1888, and of the Independence of the United States the one hundred and twelfth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To John C. Black, Commissioner of Pensions:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the United States *ex rel.* Oscar Dunlap is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ or error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness E. F. Bingham, chief justice of the said supreme court of the District of Columbia.

E. F. BINGHAM,
Chief Justice.

19 [Endorsed:] No. 28324. Law. The United States *ex rel.* Oscar Dunlap *vs.* John C. Black, Com'r of Pensions. P. M'ch 15, '81. Joyce. Writ of error and citation.

Served copy of the within writ of error and citation on John C. Black, Commissioner of Pensions, March 15, 1888.

A. A. WILSON, *Marshal.*

J. G. BIGELOW, *Att'y.*

20 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 16th day of March, 1888.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of said court, to be in due form.

Witness my hand and seal this 16 day of March, 1888.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 16th day of March, 1888.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1402. The United States *ex rel.* Oscar Dunlap, plaintiff in error, *vs.* John C. Black, Commissioner of Pensions. Filed April 2nd, 1888.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
OSCAR DUNLAP,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1402

In Error to the Supreme Court of the District of Columbia.

MOTION BY THE RELATOR TO ADVANCE THIS CASE UNDER CLAUSE 6, RULE 26, OF THE COURT.

J. G. BIGELOW,
Attorney for plaintiffs in error.

WASHINGTON, D. C.:
BYRON S. ADAMS, PRINTER,
514 EIGHTH STREET.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
OSCAR DUNLAP,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1402

In Error to the Supreme Court of the District of Columbia.

MOTION BY THE RELATOR TO ADVANCE THIS CASE UNDER CLAUSE 6, RULE 26, OF THE COURT.

And now comes the above-named relator, and moves the Court to advance this cause, and for a speedy hearing thereof, on the following grounds:

1. The petition in this case is for the peremptory writ of mandamus against the respondent as Commissioner of Pensions. It was filed in the Court below, December 19, 1887, and was certified by the Justice holding the Circuit Court to the Gen-

eral Term, to be heard in the first instance. The Court in General Term refused the relator's motion for a rule on the respondent, and dismissed his petition without a hearing thereof on the merits.

2. The Court below having refused the relator a hearing on the matters alleged in his petition, the case is still an *ex parte* proceeding, though brought into this Court by writ of error on final judgment dismissing the petition.

3. The respondent was not brought into the Court below. His citation to appear in this Court in the first instance results from the anomalous action of the Supreme Court of the District of Columbia refusing the relator the right to a hearing on his said petition. We do not admit that the respondent can be brought into Court in this manner.

4. The questions presented by the petition are of great importance to the relator, involving his legal rights under the laws of the United States.

5. The tenure of office of the respondent as Commissioner of Pensions is of uncertain duration.

We submit herewith our brief and argument on the merits of the case.

J. G. BIGELOW,
Attorney for plaintiffs in error.

To JOHN C. BLACK, Commissioner of Pensions,
Defendant in error.

You will please take notice that we shall on Monday, the 30th day of April, A. D. 1888, submit the motion, of which the foregoing is a copy, to the Supreme Court of the United States, for its judgment thereon.

J. G. BIGELOW,
Attorney for plaintiffs in error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
OSCAR DUNLAP,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1402.

In Error to the Supreme Court of the District of Columbia.

Brief of Plaintiffs in Error.

J. G. BIGELOW,
Attorney for Plaintiffs.

BYRON S. ADAMS, PRINTER.

eral Term, to be heard in the first instance. The Court in General Term refused the relator's motion for a rule on the respondent, and dismissed his petition without a hearing thereof on the merits.

2. The Court below having refused the relator a hearing on the matters alleged in his petition, the case is still an *ex parte* proceeding, though brought into this Court by writ of error on final judgment dismissing the petition.

3. The respondent was not brought into the Court below. His citation to appear in this Court in the first instance results from the anomalous action of the Supreme Court of the District of Columbia refusing the relator the right to a hearing on his said petition. We do not admit that the respondent can be brought into Court in this manner.

4. The questions presented by the petition are of great importance to the relator, involving his legal rights under the laws of the United States.

5. The tenure of office of the respondent as Commissioner of Pensions is of uncertain duration.

We submit herewith our brief and argument on the merits of the case.

J. G. BIGELOW,
Attorney for plaintiffs in error.

To JOHN C. BLACK, Commissioner of Pensions,
Defendant in error.

You will please take notice that we shall on Monday, the 30th day of April, A. D. 1888, submit the motion, of which the foregoing is a copy, to the Supreme Court of the United States, for its judgment thereon.

J. G. BIGELOW,
Attorney for plaintiffs in error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
OSCAR DUNLAP,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1402.

In Error to the Supreme Court of the District of Columbia.

Brief of Plaintiffs in Error.

J. G. BIGELOW,
Attorney for Plaintiffs.

BYRON S. ADAMS, PRINTER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
OSCAR DUNLAP,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1402.

In Error to the Supreme Court of the District of Columbia.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE RELATOR'S CASE.

The petition of the relator, Oscar Dunlap, was filed in the court below on December 19, 1887, in which he alleges:

1. That during the late civil war he served in the military service of the United States, and was Captain of Company I, 26th Illinois Volunteers. That while in said service and in the line of duty, he sustained, December 28, 1864, such wounds

and injuries as resulted at the time thereof in the amputation of his right hand and right foot, and, at the same time sustained a terrible head injury, causing the fracture of the skull and left jaw, resulting in epilepsy and the permanent impairment of his mind and memory; whereby he became, and now is, so totally and permanently disabled as to be rendered utterly helpless, or so nearly so as to require regular aid and attendance of another person.

2. That his disability from said combined causes is much greater than results from the loss merely of both hands or both feet, or the law requires in any case, to entitle the claimant to be rated therewith. That for his said disability the law provides a pension of $25 per month from June 6, 1866, (section 4,697 R. S. U. S., Pension Ll. 6*); $31.25 per month from June 4, 1872 (section 4,698 R. S., U. S. Pension Ll. 7); $50 per month from June 4, 1874 (act June 18, 1874, Pension Ll. 35); and $72 per month from June 17, 1878 (act June 16, 1880, Pension Ll. 47).

3. But that the Pension Office, under the administration of respondent's predecessors granted him a pension only for the loss of his hand and foot, by Pension Certificate No. 66,419, and rated him therefor at $20 from date of discharge, $24 from June 4, 1872, and $36 from February 28, 1877, and no allowance was made for the greater disability resulting from said head injury.

4. That by reason of said head injury and resulting epilepsy, his mind and memory were so permanently impaired that he has never been able since the incurrence of the injury, to retain scarcely more than a momentary recollection of transpiring events, and says that, although he has no recollection at all as to what the fact is, he is informed he never made application for pension on account of his said head injury, combined with the loss of the right hand and right foot, until the time

*For convenience of reference, the Pension Laws are referred to as found in pamphlet form as published by the Pension Office, copies of which are left with the Clerk for the several members of the court.

hereinafter mentioned. But avers that the record and the proofs on file clearly show from the beginning, the injury to his head as well as the loss of his right hand and right foot, and his utterly helpless condition on account of these combined disabilities, requiring regular aid and attendance of another person.

5. That by reason of his failure, or the failure of those persons who were engaged to act in his behalf, to make such application for a pension for and on account of his entire disabilities, resulting as well from his said injury to the head, as from the loss of his right hand and right foot, the Pension Office, under the respondent's predecessors, granted him a pension only for the loss of the right hand and right foot, which was particularly specified as the cause of the disability for which pension was claimed.

6. That the limitation of the Pension Laws does not apply to minors, and persons whose minds and memories are impaired, as in his case, to such an extent as to render them incapable of making valid contracts, and therefore, the fact that for a series of years he omitted or neglected to apply for a pension on account of said head injury cannot militate against him, nor is his right to such pension in any manner barred by the limitations of the Pension Laws, on account of such omission or neglect.

7. But he says, that he did make formal application to the Pension Office on June 26, 1880 for, and on account of his said head injury, as well as for and on account of the loss of his right hand and right foot, and since that date has had and now has, a claim pending before the Pension Office, for pension on account of these combined disabilities.

And the petition sets forth: That the act of Congress (commonly called the arrears of pension act) entitled "An act to "provide that all pensions on account of death, or wounds re- "ceived or disease contracted in the service of the United States "during the late war of the rebellion, which have been granted, "or which shall hereafter be granted, shall commence from the

" date of death, or discharge from the service of the United States, " for the payment of arrears of pension," approved January 25th, 1879, and as amended by the act of March 3, 1879, provides as follows :

"That the rate at which the arrears of invalid pensions shall be allowed and computed in the cases which have been or shall hereafter be allowed, shall be graded according to the degree of the pensioner's disability from time to time, and the provisions of the pension laws in force over the period for which the arrears shall be computed.

That section one of the act of January twenty-fifth, eighteen hundred and seventy-nine, granting arrears of pensions, shall be construed to extend to and include pensions on account of soldiers who were enlisted or drafted for the service in the war of the rebellion, but died or incurred disability from a cause originating after the cessation of hostilities, and before being mustered out: *Provided*, That in no case shall arrears of pensions be allowed and paid from a time prior to the date of actual disability.

SEC. 2. All pensions which have been, or which may hereafter be, granted in consequence of death occuring from a cause which originated in the service since the fourth day of March, eighteen hundred and sixty-one, or in consequence of wounds or injuries received, or disease contracted since that date, shall commence from the death or discharge of the person on whose account the claim has been or is hereafter granted, if the disability occurred prior to discharge; and if such disability occurred after the discharge, then from the date of actual disability, or from the termination of the right of party having prior title to such pension : *Provided*, The application for such pension has been or is hereafter filed with the Commissioner of Pensions prior to the first day of July, eighteen hundred and eighty, otherwise the pension shall commence from the date of filing the application; but the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under sixteen years of age."

"SEC. 3. Section forty-seven hundred and nine of the Revised Statutes is hereby repealed." (Pension Ll. 43, 44 and 45.)

That having filed his application therefor, with the Commissioner of Pensions prior to July 1, 1880, he is entitled to arrears of pension under and by virtue of said act, amended as aforesaid, from the date of his discharge according to the degree of his entire disability and the provisions of the Pension Laws in force from time to time, over the intervening period. That he was discharged May 15, 1865, and is entitled to pension from thence, and, holding the rank of Captain, at the time of the incurrence of said disabilities, his pension was never less than $20 per month. But that the laws provide that the rate of pension for a disability requiring aid and attendance of another person shall be $25 per month, from June 6, 1866; $31.25 from June 4, 1872; $50 from June 4, 1874, and $72 from June 17, 1878. (Sects. 4,697, 4,698, R. S., U. S., acts of June 18, 1874, and June 16, 1880, Pension Laws pp. 6, 7, 35 and 47.) That he is entitled to the difference monthly between these sums and what has been allowed him, and that said arrears of pension act was passed by Congress for such purpose to enable him and all pensioners in like situation with himself to claim and receive arrears of pension, provided claim be made prior to July 1, 1880.

8. That his said application coming on to be considered by the respondent as Commissioner of Pensions, and for his official action and decision thereon, the respondent found and ruled that the relator now is, and continuously has been since discharge, so disabled from his said wounds and injuries, as to require regular aid and attendance of another person. That the respondent made the following official adjudication in the relator's behalf:

"Certificate No. 66,419, Oscar Dunlap, Co. 'I,' 26 Illinois.

"DEPARTMENT OF THE INTERIOR,

"BUREAU OF PENSIONS,

"Washington, D. C., *October*, 15, 1887.

"*Ruling No.* 222.

"In this case the application of the claimant for re-rating and "for increase will be allowed at $50 per month, from May 25, "1881, and the date of the first medical examination under "claimant's application of June 26, 1880.

"This rating is allowed under the act of June 18, 1874, it "sufficiently appearing by the evidence in this case that the "claimant has lost both a hand and a foot, and at the same "time has been so additionally injured in the head, as from a "period prior to the re-rating or increase in this case, to render "him totally and permanently helpless, requiring from thence "until now the regular personal aid and attendance of another "person.

"The reason why the claimant's rating is not advanced to "$72 per month is, that he was not on the 16th of June, 1880, "receiving pension at the rate of $50 per month, nor was he "entitled to receive a pension at $50 per month at that date, "for the reason that, while the degree of helplessness, which "has been shown, was that contemplated by the law, the claim-"ant himself (neither on his own motion, nor under the "guidance of those who are legally responsible for his actions "in this claim) has not made application to be rated in pur-"suance of the act of June 18, 1874, but on the contrary, "thereof, had asked to be rated, and had been rated at $36 per "month, under the act of February 28, 1877. Such application "for increase was made by him April 30, 1877, and an allow-"ance of $36 was made to him under said application, May "24, 1877.

"It should be noted that in this application the claimant did "not refer to his injuries of head, and only referred to and "stated the loss of his hand and his foot, clearly intending to

"avail himself of the provisions of the act of February 28, 1877.

"This was his view as evidenced by the fact that he received "the pension under this certificate without questioning or de- "mur, at the rate provided in said act, acquiescing in the decis- "ion of the office in the issue of the certificate aforesaid.

"It thus appears that the first time at which rating should "have been made to the claimant under the act of June 16, "1880, or the acts which it amended was, as before stated, at "the date of the filing of his application for increase, dated "from June 26, 1880, and under the law as now and then ex- "isting, the earliest date at which re-rating and increase could "have been allowed him, if at all, under said act, was the date "of the first medical examination had after the filing of his ap- "plication. The date of this medical examination was May "25, 1881, at that time he should have been rated according "to the testimony then on file (which has been greatly "strengtioned by testimony since added) at the rate of $50 per "month, and the failure to do so was manifestly a failure on "the part of the office, and a re-rating will be ordered in con- "formity with this ruling, the Commissioner holding in this, "as in other cases that to entitle to the benefits of the act of "June 16, 1880, even under the construction given to that act "in the case of Whitehead, dated July 12, 1881, by Secretary "Kirkwood, there must have been not only the right to pen- "sion, but that right itself must have been operative by the "act of the pensioner asserting his claim.

"JOHN C. BLACK,
Commissioner."

Recorded in Vol. 2, p. 136, Commissioner's Rulings

9. That thereupon the respondent caused said Pension Certificate to be reissued at $50 per month from May 25, 1881, but refused to grant arrears of pension from date of discharge, or to comply with the requirements of the law in that behalf. That the respondent has thus expressly found the facts in the relator's case to be (1), That while in the military service of

the United States and in the line of duty the relator sustained such wounds and injuries as resulted in the loss of his right hand and right foot, and at the same time sustained injury to the head. (2), That the relator was thereby rendered "totally and permanently helpless, requiring from thence until now, the regular personal aid and attendance of another person;" and (3), That relator applied to the Commissioner of Pensions on June 26, 1880, for pension on account thereof.

That upon this finding of the facts, whether the relator is entitled to a re-rating and increase of pension from date of discharge, so as to give unto him a pension commensurate with his disabilities so found to exist by the respondent, is a question of law, and it does not lie in the discretionary powers of the respondent, as such Commissioner, to deny or in any wise abridge his rights with respect thereto.

That the relator's is a case under the arrears of pension act aforesaid, and having filed his claim within the express terms of the act amended as aforesaid, he is entitled to arrears of pension for his entire disability as so found to exist by the respondent from the date of his discharge, and according to such rate as is provided for by the provisions of the Pension Laws covering the intervening period. That for the precise disability the respondent, in the discharge of his official duty as such Commissioner, and in the exercise of his judgment and discretion in all the premises, has found the relator to now have, and to have continuously had since his discharge, to wit: That the relator is so disabled from the loss of his right hand and right foot, and so additionally injured in the head as "to render him totally and permanently helpless, requiring from thence until now the regular personal aid and attendance of another person," is expressly pensioned at $25 per month from June 6, 1866, by the provisions of Section 4,697, R. S., U. S., (Pension Ll. 6), at $31.25 from June 4, 1872, by the provisions of Section 4,698, R. S., U. S., (Pension Ll. 7), at $50 from June 4, 1874, by the provisions of the act of June 18, 1874, (Pension Ll. 35), and at $72 from June 17, 1878, by the provisions of the act of

June 16, 1880, (Pension Ll. 47), and that upon such adjudication by the respondent, he is entitled to be so pensioned by the express provisions of the arrears of pension act, amended as aforesaid by the act of March 3, 1879. That such adjudication so made by the respondent in the discharge of his official duty as such Commissioner, has been ratified and confirmed by the Honorable Secretary of the Department of the Interior, as evidenced by relator's said Pension Certificate reissued as aforesaid, signed by the acting Secretary, and countersigned by the respondent, as Commissioner of Pensions, and sealed with the Departmental seal.

That all the reasons given by the respondent in his said adjudication of relator's claim, why he cannot grant full arrears of pension and an increase to $72 per month, to the relator, are wholly irrelevant and invalid in the law. That it is wholly immaterial whether the relator was on the Pension Roll at all or not, on June 16, 1880. That to have made his claim within the time specified in the arrears of pension act, amended as aforesaid, to wit: before July 1, 1880, is enough to entitle him to arrears of pension from date of discharge under the law. That the date, May 25, 1881, of the alleged medical examination in his case has no legal significance, whatever, in the case, nor has any of the other alleged reasons of the respondent for his refusal to grant full arrears of pension to the relator, any significance in the case. That the language of the law is couched in plain and simple terms, declaring that the relator, whose claim therefor was filed June 26, 1880, shall be entitled to arrears of pension from date of discharge. That the only condition thereby imposed is that such claim shall be filed with the Commissioner of Pension before July 1, 1880.

And the relator prays for the peremptory writ of mandamus to compel the respondent, as Commissioner of Pensions, to forthwith reissue his said Pension Certificate with the following rating: $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, first deducting all pension

that has been paid him for these periods. (Record pp. 1 to 8.)

The cause was referred by the Justice holding the Circuit Court to the General Term to be heard in the first instance. And the cause coming on to be heard in that Court on the relator's motion for a rule on the respondent to show cause, if any he has, why the peremptory writ of mandamus should not issue as prayed, was argued by the counsel for the petitioner, and, the motion being overruled, the petition was dismissed. Thereupon the relator sued out his writ of error, and, for prudential reasons, gave bond in the penalty fixed by the Court, and cited the respondent to appear in this Court, although the case has never progressed beyond an *ex parte* proceeding. (Record pp. 8 to 12.)

Assignment of Errors.

1. The Court erred in holding and ruling that the relator's case, as adjudicated by the respondent, is not a "specific" case within the letter as well as the meaning of the Pension Laws.

2. The Court erred in holding and ruling the Pension Laws do not grant a "specific" rate of pension, from June 6, 1866 to the present time, to the relator for the particular degree of disability the respondent, as Commissioner of Pensions, has found and adjudged the relator to have sustained in the military service and in the line of duty, to now have and to have continuously had since the date of his discharge.

3. The Court erred in holding and ruling that the relator for the degree of disability so finally found and adjudged by the respondent, as Commissioner of Pensions, to now exist, and to have continuously existed since discharge, and to have been incurred in the military service and line of duty, is not entitled, as a matter of legal right, to a pension at the rate of $25 per month from June 6, 1866, under the equivalent clause of Section 4,697 R. S. U. S. (Pension Ll. 6); of $31.25 per month from June 4, 1872, under the equivalent clause of Section 4,698

R. S. U. S. (Pension Ll. 7); of $50 per month from June 4, 1874, under the equivalent clause of the act of June 18, 1874 (Pension Ll. 35), and of $72 per month from June 17, 1878, under the act of June 16, 1880 (Pension Ll. 47).

4. The Court erred in holding and ruling that the degree of disability, that renders the claimant "totally and permanently helpless, requiring from thence until now the regular personal aid and attendance of another person" as found in the language of the respondent, is not specifically pensioned at $25 per month from June 6, 1866, by the provisions of said Section 4,697; at $31.25 per month from June 4, 1872, by the provisions of said Section 4,698; at $50 per month from June 4, 1874, by the provisions of said act of June 18, 1874; and at $72 per month from June 17, 1878, by the operation of the said act of June 16, 1880.

5. The Court erred in holding and ruling that the respondent, as Commissioner of Pensions, has authority of law, in the exercise of his discretion, to grant a less or different rate of pension to the relator than is specifically granted by the law for the specified degree of disability the relator has been finally adjudged to have incurred in the military service and in the line of duty, to now have, and to have continuously had since his discharge.

6. The Court erred in holding the relator estopped from claiming arrears of pension for said head injury, because he did not apply for pension on account thereof prior to June 16, 1880.

7. The Court erred in holding that the relator is estopped or barred from claiming arrears of pension on account of said head injury, because his application therefor was not filed with the Commissioner of Pensions until June 26, 1880. It was error in the Court to rule that the doctrine of estoppel applies to a claim for pension, aside from the limitations of the law itself.

8. The Court erred in not holding and ruling the claim of the relator to come expressly under and within the terms of

the arrears of pension act, the same having been filed with the Commissioner of Pensions before July 1, 1880.

9. The Court erred in holding that the alleged medical examination of May 25, 1881, (ordered eleven months after the relator had filed his claim under the arrears of pension act,) has any legal significance whatever in fixing the date to which the arrears of pension shall relate. It was error in the Court to refuse to hold that such a claim on the part of the respondent is in contravention of the plain and unmistakable terms of the arrears act aforesaid.

10. The Court erred in holding the relator to have other legal remedy for the redress of his grievances than these proceedings for mandamus.

11. The Court erred in holding the respondent, as Commissioner of Pensions, is exempted from the process prayed for in the petition.

12. The Court erred in overruling relator's motion for the alternative writ, or for a rule on the respondent to show cause, and in dismissing his petition.

Brief for Relator.

I.

Although the case of the relator finally resolves itself into a very small compass, yet it is indispensable to a complete and thorough understanding of his legal right in all the premises, to examine into the scheme of the laws as adopted by Congress for granting pensions. This scheme so far as applicable to this case, is embodied, developed and perfected in Sections 4,697, 4,698, 4,698½ and 4699, R. S. U. S., which are herein given in full. I do not deem it necessary to examine here the several acts that are consolidated and amended by the act of March 3, 1873, and which is now, as to so much thereof as relates to the relator's case, embodied in said sections.

As the law stood, prior to July 4, 1864, the rate of pension was established for the army as follows: The pension for "total disability" for a Lieutenant-Colonel and all officers of a higher rank in the military service, $30 per month; for a Major $25; for a Captain $20; for a First Lieutenant $17; for a Second Lieutenant $15, and for all others, including non-commissioned officers and privates, $8 per month. (Section 4,695, R. S. U. S., Pension Ll. 4.)

The disability resulting from the loss of a hand or foot, or from the anchylosis of an elbow or knee, and all equivalent degrees of disability from any other cause, whether injury or disease, is within the meaning of this section of the law, "total disability," and entitles the claimant to the rate of pension specified, according to rank.

The law grants no pension for an injury or for disease, but the thing that is pensionable is the resulting disability. But the cause and the resulting disability are so closely related that often, even in the Pension Laws themselves, the cause is named as the disability, as for instance, the loss of both hands or both feet is mentioned as entitling a claimant to a certain rate of pension, when the meaning clearly is that the disability resulting from such loss.

All degrees of disability mentioned in the Pension Laws, or for which pension is granted, are but relative disabilities. The standard to which they relate is that of perfect physical soundness, and not of a greater degree of helplessness.

While the rate remained fixed by the provisions of this section, the pension of all enlisted men was limited to $8 per month, of a Second Lieutenant to $15, of a First Lieutenant to $17, of Captain to $20, of a Major to $25, and of a Lieutenant-Colonel and all officers of a higher rank to $30 per month, no matter how great the degree of disability.

The war had progressed for more than three years, and the number of men in the Union army that had been disabled by wounds and disease sustained and incurred in the military service, had multiplied and increased until the hospitals all over

the country were filled with the sick and wounded. In this vast number of disabled persons, there was found every degree of disability ranging from a condition of utter helplessness, as from the loss of both hands, or both feet, or from other cause, as, for instance, the case of the relator, requiring regular daily aid and attendance of another person, down to a comparatively trifling gun shot wound.

The inadequacy of the law as it then existed, limiting the pension of a private soldier to $8 per month, to mete out even the semblance of justice and equality, was perfectly apparent to the Legislative mind.

It was such considerations that induced Congress to attempt a different scheme for granting pensions—a plan that should have for its object the granting of a pension as nearly commensurate with the disability of the claimant as practicable.

The efforts of the Legislature in that direction resulted at first in very imperfect laws, as will be seen by examining the laws themselves.

But Congress kept at the work from July 4, 1864, to March 3, 1873, when by the act of that date, entitled "An act to revise, consolidate and amend the laws relating to pensions," and now, so far as the case before the Court is concerned, embodied in said Sections, 4,697, 4,698, 4,698½ and 4,699, R. S., U. S., the said scheme is fully developed and perfected, in, what is to my mind, a masterly piece of legislation to the provisions of which I call the attention of the Court.

These sections are as follows:

Rate and commencement of pension for permanent and specific disabilities subsequent to 4 July, 1864, and prior to 3 June 1872. Sec. 3, 3 March, 1873. Sec. 5, 4 July, 1864. See sec. 1, 6, June, 1866, and sec 5, 25 July, 1866. Sec. 3, 3 March, 1865.

SEC. 4,697. For the period commencing July fourth, eighteen hundred and sixty-four, and ending June third, eighteen hundred and seventy-two, those persons entitled to a less pension than hereinafter mentioned, who shall have lost both feet in the military or naval service and in the line of duty, shall be entitled to a pension of twenty dollars per month; for the same period those persons who, under like circumstances, shall have lost both hands

or the sight of both eyes, shall be entitled to a pension of twenty-five dollars per month; and for the period commencing March third, eighteen hundred and sixty-five, and ending June third, eighteen hundred and seventy-two, those persons who under like circumstances shall have lost one hand and one foot shall be entitled to a pension of twenty dollars per month; and for the period commencing June sixth, eighteen hundred and sixty-six, and ending June third, eighteen hundred and seventy-two, those persons who under like circumstances shall have lost one hand or one foot shall be entitled to a pension of fifteen dollars per month; and for the period commencing June sixth, eighteen hundred and sixty-six, and ending June third, eighteen hundred and seventy-two, those persons entitled to a less pension than hereinafter mentioned, who by reason of injury received or disease contracted in the military or naval service of the United States and in the line of duty shall have been permanently and totally disabled in both hands, [or who shall have lost the sight of one eye, the other having been previously lost,] or who shall have been otherwise so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require regular personal aid and attendance of another person, shall be entitled to a pension of twenty-five dollars per month; and for the same period those who under like circumstances shall have been totally and permanently disabled in both feet or in one hand and one foot, or otherwise so disabled as to be incapacitated for the performance of any manual labor, but not so much as to require regular personal aid and attention, shall be entitled to a pension of twenty dollars per month; and for the same period all persons who under like circumstances shall have been totally and

For loss of hand and foot, see act 28 Feb., 1877.

For loss of both hands, both eyes or both feet, see act 17 June, 1878 and 3 March, 1879.

For leg amputated at hip-joint, see act 3 March, 1879.

Sec. 1, act 6 June, 1886.

Sec. 12, act 27 July, 1868.

As to total and permanent helplessness, see amendment act 18 June, 1874, and act 16 June, 1880.

permanently disabled in one hand or one foot, or otherwise so disabled as to render their inability to perform manual labor equivalent to the loss of a hand or foot, shall be entitled to a pension of fifteen dollars per month.

Rate and commencement of pension for permanent and specific disabilities subsequent to 4 June, 1872.

Sec. 4, 3 March, 1873.

Act 8 June, 1872.

SEC. 4,698.* From and after June fourth, eighteen hundred and seventy-two, all persons entitled by law to a less pension than hereinafter specified, who while in the military or naval service of the United States, and in line of duty, shall have lost the sight of both eyes, or shall have lost the sight of one eye, the sight of the other having been previously lost, or shall have lost both hands, or shall have lost both feet, or been permanently and totally disabled in the same, or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the regular personal aid and attendance of another person, shall be entitled to a pension of thirty-one dollars and twenty-five cents per month; and all persons who, under like circumstances, shall have lost one hand and one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to be incapacitated for performing any manual labor, but not so much as to require regular personal aid and attendance, shall be entitled to a pension of twenty-four dollars per month; and all persons who under like circumstances, shall have lost one hand, or one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or foot, shall be entitled to a pension of eighteen dollars per

As to total and permanent helplessness, see act 18 June, 1874, and act 16 June, 1880.

For loss of hand and foot, see act 28 Feb., 1877.

For loss of both eyes, both hands or both feet, see act 17 June, 1878 and 3 March, 1879.

For leg amputated at hip-joint, see act 3 March, 1879.

*Amended by acts of June 18, 1874 (2); February 28, 1877; June 17, 1878; March 3, 1879; June 16, 1880; March 3, 1883; and March 3, 1885.

month: *Provided*, That all persons who, under like circumstances, have lost a leg above the knee, and in consequence thereof are so disabled that they cannot use artificial limbs, shall be rated in the second class and receive twenty-four dollars per month from and after June fourth, eighteen hundred and seventy-two; and all persons who, under like circumstances, shall have lost the hearing of both ears shall be entitled to a pension of thirteen dollars per month from the same date: *Provided*, That the pension for a disability not permanent, equivalent in degree to any provided for in this section, shall, during the continuance of the disability in such degree, be at the same rate as that herein provided for a permanent disability of like degree.

Sec. 4, 3 March, 1873.

Sec. 4, 3 March, 1873.

Commencement of increase for disabilities not permanent and specific.

SEC. [4,698½.] Except in cases of permanent specific disabilities, no increase of pension shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same, made under the pending claim for increase, and in this, as well as all other cases, the certificate of an examining surgeon, or of a board of examining surgeons, shall be subject to the approval of the Commissioner of Pensions.

Sec. 4, 3 March, 1873.

See sec. 4, 10 April 1866.

Division of rate of $18 per month.

SEC. 4,699. The rate of eighteen dollars per month may be proportionately divided for any degree of disability established for which section forty-six hundred and ninety-five makes no provision.

Sec. 5, 3 March, 1873.

In these sections of the Revised Statutes of the United States, we find the plan, the scheme adopted by Congress fully exemplified. Crude and incongruous at first, the laws finally emerge from the hand of the law maker as perfect a system or code as I have ever examined. All inequalities that now exist growing out of subsequent legislation are due exclusively to

the fact that such subsequent legislation is not in harmony with the scheme herein developed and made as perfect as the hand of man can make laws.

The various acts that are revised and consolidated in these Sections are referred to in the marginal notes.

I will briefly examine this code of laws.

The act of July 4, 1864 (Sect. 4,697), provides a pension for the disability resulting from the loss of both hands* of $25 per month. This act, with respect to such disability, merged all rank up to and including that of Major, by providing an equal pension for all persons, whether enlisted men or Commissioned Officers, up to and including that rank for the loss of both hands. The act also provides a pension for the loss of both feet of $20 per month with respect to which disability all rank is merged up to and including that of Captain.

But the act was very defective for want of provision for a like pension for an equivalent disability from other causes. To illustrate: There is no provision for the loss of one hand and the anchylosis of the elbow of the other arm, nor for the loss of one foot and the anchylosis of the knee of the other leg, although these disabilities are respectively in all respects equal to the loss of both hands or both feet.

By the act of March 3, 1865, the disability resulting from the loss of one hand and one foot is pensioned at the same rate with the loss of both feet, at $20 per month, as of equal disability therewith. This act is also defective for the same reason.

But Congress was not slow to see these defects, and by act of June 6, 1866, these glaring inequalities were carefully guarded against by incorporating in the law provisions granting a like pension for equivalent disability from other causes than those particularly enumerated in the law, to wit: the loss of both hands, the loss of both feet or one hand and one foot, and the loss of one hand or one foot.

*The loss of the sight is not referred to, because blindness, as well as deafness, is the loss of one of the senses, the disability therefrom is *sui generis*, and not necessarily implying any impairment at all of the physical powers.

The clause in this Section that provides an equal pension with the loss of both hands for an equivalent disability from June 6, 1866, is as follows: "OR WHO SHALL HAVE BEEN OTHERWISE SO TOTALLY AND PERMANENTLY DISABLED AS TO RENDER THEM UTTERLY HELPLESS, OR SO NEARLY SO AS TO REQUIRE REGULAR PERSONAL AID AND ATTENDANCE OF ANOTHER PERSON SHALL BE ENTITLED TO A PENSION OF TWENTY-FIVE DOLLARS PER MONTH."

The Court will here observe that the respondent has finally adjudged the relator to now have, and to have continuously had the precise disability that is here specified in the law as entitling a claimant to $25 per month from June 6, 1866.

The Court will further notice that the relator, having held the rank of Captain at the time he sustained his said wounds and injuries, was entitled for either the disability resulting from the head injury, the loss of the right hand, or the loss of his right foot to a pension of $20 per month under said Section 4,695. It was not till June 6, 1866, that the relator could possibly get a higher rate of pension by coupling the disability resulting from the fracture of the skull and left jaw, with that resulting from the loss of the hand and foot. And it is quite probable that for this reason the person or persons who acted in his behalf in preferring his original claim for pension omitted to mention as the foundation for any part of said claim this terrible head injury. But it is wholly immaterial what the reasons were. It is enough that he filed his claim therefor before July 1, 1880, as I will show.

The Court will further observe that in the mind of the Legislature, during the period covered by said Section 4,697, namely, from July 4, 1864, to June 3, 1872, the disability resulting from the loss of both hands is greater than that resulting from the loss of both feet, or one hand and one foot. But suppose a person to have sustained a greater disability than results from the loss of "both feet" or "one hand and one foot," by having lost both legs at the hip, or an arm at the shoulder, and a leg at the hip. Such loss necessarily involves, in the

one case, the loss of "both feet," and, in the other, the loss of "one hand and one foot." It does not, however, follow that these supposed cases are to be rated from June 6, 1866, as for the loss merely of "both feet," or of "one hand and one foot." On the contrary the disability in these cases, is, in all respects equivalent to that resulting from the loss of "both hands," and the law contemplates a like rate of pension therewith from June 6, 1866. But whether they are of that degree of helplessness required by the law, rendering the claimant "so totally and permanently disabled as to render him utterly helpless, or so nearly so as to require regular aid and attendance of another person," involves the exercise of judgment and discretion, and appertains to those executive duties that are known as *quasi* judicial, and which cannot be controlled nor directed to be performed in any particular manner, or to accomplish any particular result by mandamus. But let there be a final finding and adjudication on the part of the Commissioner of Pensions that the claimant is so disabled, and let such adjudication be ratified and confirmed by the Secretary, then the remaining duty to be performed is purely ministerial, consisting of the simple act of granting the rate of pension that is specifically provided by the law, to wit: $25 per month from June 6, 1866.

The relator has been found and adjudged by the respondent, as Commissioner of Pensions, to have this precise degree of disability, to have incurred the same in the military service and line of duty, that it is and has always been since sustained of a permanent character, and that the same results from the loss of his right hand and right foot, and injury to the head.

While the Court has no judicial concern with these matters pertaining to the exercise of the judgment and the discretionary powers of the respondent, as Commissioner of Pensions, it is nevertheless true, that no case was ever known to suffer in this Court because it possessed merit.

The case, then, of the relator is for the loss of his right hand and right foot, and the fracture of the skull and left jaw, re-

sulting in epilepsy and the permanent impairment of the mind and memory. For the present purposes of this case, the allegations of the petition must be taken to be absolutely true, except such as are conclusions of the law. The disability of the relator resulting from these combined injuries is manifestly much greater than results from the loss of both hands or both feet, and much greater than the law requires in any case to entitle a claimant upon a proper adjudication in his behalf, to be rated in the first class.

The disability resulting from a like head injury has been adjudged in many cases to be sufficient of itself to justify classification in this class.

There was, therefore, no ground for the respondent, on the indisputable facts of the case, to make any other finding or adjudication than that the relator, by the said combined causes, was so totally and permanently disabled as to render him utterly helpless, as so nearly so as to require "from thence until now the regular personal aid and attendance of another person."

There is no room for error of judgment on the part of the respondent in making the adjudication he did in the claimant's behalf, and in finding as a fact that the petitioner's "degree of helplessness, which has been shown, was that contemplated by the law," as entitling a rating in the first class.

This degree of disability is specifically rated at $25 per month, under said Section 4,697 from June 6, 1866, by the provision thereof above quoted.

This same degree of disability is specifically pensioned at $31. 25 per month from June 4, 1872, by a like provision in Section 4,698 Revised Statutes of the United States. Therein and from that date the disability resulting from the loss of both feet is coupled with that resulting from the loss of both hands and a like pension therefor, from thence is granted therewith by the Pension Laws. The loss of one hand and one foot is rated in the second class at $24 per month, and the loss of a hand or foot at $18, and provision is made for a like rate of pension for

all degrees of disability equivalent to that resulting from the causes particularly specified in this and the preceding section.

Congress has herein designated certain well defined causes, namely: the loss of both hands or both feet, the loss of one hand and one foot, the loss of a hand or foot, as resulting in certain degrees of disability, and has, by apt provisions, provided a like rate of pension for all cases of equivalent disability from whatsoever cause originating in the military service and line of duty.

It is clear that these well defined causes of disability are named as standards of measurement of disability; and the intent of the lawmaker to provide equal rate of pension for all cases whosoever of equal disability, ranking in grade or degree with that resulting from the loss of a hand or foot, up to that degree of utter helplessness, requiring regular daily aid and attendance of another person, and illustrated by the loss of both hands or both feet, is clearly manifest in these wise provisions of the law. To give them a different construction or meaning is to impute to Congress the deliberate purpose of providing by law, a greater rate of pension for one person for a less disability than is thereby provided for his equally meritorious comrade for a greater disability.'

The Court will observe that the Commissioner of Pensions has no choice to make, nor judgment nor discretion to exercise in any case that has been finally adjudged to have either of the several different degrees of disability that are mentioned in these two sections of the law, with respect to the rate of pension; that the law itself specifically fixes the rate. For instance; The law specifically fixes the rate of $31.25 per month from June 4, 1872, for the specific degree of disability the relator has been finally adjudged to now have, and to have continuously had since discharge; the rate of $24 per month for the degree of disability equivalent to that resulting from the loss of one hand and one foot, and the rate of $18 per month for the degree of disability equivalent to that resulting from the loss of a hand or foot.

At first impression it might appear that those cases, and those only, are "specific cases" in which the cause of the disability, as well as the rate of pension, is specified in the law. But this is not the case. The thing that is pensionable is the *disability* and *not* the cause; pension is granted but for one thing in all cases, namely, *disability*, and it is the degree of this disability, and not the cause that entitles the claimant to the rate of pension particularly designated in these two sections. If it were possible for a soldier to lose both hands or both feet, and suffer no disability whatever from such loss, he would be entitled to no pension at all.

All cases, then, that come under Sections 4,697 and 4,698 are specific, that is, the rate of pension is specified in the law, and Congress has relieved the Commissioner of all responsibility with respect thereto. These several classes of pensioners are known as the "specific classes" in the Pension Laws.

But the great bulk of pensioners have disabilities less in degree than result from the loss of a hand or foot, and less in degree than is requisite to entitle a claimant to a rating in either of the specific classes.

These are pensioned under the provisions of Section 4,699, Revised Statutes, U. S. above given.

An examination of the provisions of this section will show that the Commissioner is clothed not only with the authority to determine whether the alleged disability was incurred in the service and line of duty, and the degree thereof, but also to fix the rate of pension, being limited to within $18 per month. To illustrate: Suppose a claimant for invalid pension on account of the disability resulting from the loss of two fingers, alleged to have resulted from a gun shot wound received in the service and line of duty. the Commissioner of Pensions, in the exercise of his judgment and discretion, can fix the rate at any sum less than $18 per month.

And thus it will be seen Congress has by these sections of the law provided a complete code covering every possible case that can arise; that the scheme is to grant, as nearly as practica-

ble, equal pensions for equal disabilities, no matter from what cause arising, provided that cause originated in the service and line of duty, and, for this purpose, has divided pensioners into the "specific" and "non specific" classes according to the degree of disability, and has subdivided the "specific" class into different classes according to the degrees of disability therein specified, has fixed a standard for the measurement of disability for each sub-class, namely, (in Section 4,698), the disability resulting from the loss of both hands or both feet, the standard for the first class, the disability resulting from the loss of one hand and one foot, the standard for the second class, and the disability resulting from the loss of a hand or foot, the standard for the third class, and by apt provisions of law, all cases of equivalent disability are grouped around these several standards according to the degree of disability, a like pension being provided for a like degree of disability albeit from different causes. And for the "non specific" class, which includes all the lesser disabilities, the Commissioner of Pensions is authorized by Section 4,699 to fix the rate, being restricted to within $18 per month.

And now I call attention to Section 4,698½, which provides that "no increase of pension shall be allowed to commence prior to the date of the Examining Surgeon's certificate establishing the same," "except in cases of permanent specific disabilities."

A case may be "permanent" and belong to either the "specific" or the "non specific" class. The disability resulting from the loss of both hands or both feet, or from the loss of one hand and one foot, or from the loss of a hand or foot, is illustrative of a "permanent" disability belonging to the "specific" class, and the disability resulting from the loss of a thumb or a finger illustrates a case of "permanent" disability appertaining to the "non specific" class. The Court will take judicial notice that in the cases cited, the disability is of a "permanent" character.

The case of the relator belongs to the "permanent specific" class. As to the permanency of the disability resulting from the loss of his right hand and right foot, the Court will take judicial notice that it is permanent, and as to the disability resulting from the fracture of the skull and left jaw, the petition expressly alleges it to be "permanent," and the respondent has so expressly found and adjudged the fact to be. The nature of this head injury is such as to necessarily make the disability resulting therefrom of a permanent character.

So also a case of *increasing* or *decreasing* disability may belong to either the "specific" or "non specific" class. All depends on the degree of disability. For example, a claimant is pensioned for rheumatism at $18 per month, under Section 4,698, as for a disability "equivalent to the loss of a hand or foot." He applies for an increase on the ground that his disability has increased from said cause. He furnishes proof of the increase, and is ordered before the Board of Examining Surgeons, and it is found and adjudged that his disability has progressed into a condition of helplessness equivalent to that resulting from the loss of both hands or both feet, "requiring regular personal aid and attendance of another person," and his pension is accordingly (under this section) increased to the first class of "specific" cases and pensioned at $31.25 per month. Now here is a case of "progressive," as contradistinguished from a case of "permanent" disability, the case remaining all the while in the "specific" class, and no increase can "be allowed to commence prior to the date of the Examining Surgeon's Certificate establishing the increase of disability." Again, let us suppose, by way of illustration, another case of rheumatism, in which the degree of disability is less than is requisite to entitle a rating in the "specific" class, that is, less than the disability that results from the loss of a hand or foot. It is pensioned under Section 4,699, in the "non specific" class and for instance, at $12 per month. An application is likewise made on the ground of an increase of disability from said cause. The claimant furnishes his proofs, is ordered for examination, and

the Certificate of the Examining Surgeon sets forth an increase of disability "equivalent to the loss of a hand or foot," and the Commissioner approves of the certificate and an increase is granted to $18 per month, under Section 4,698. Now here is a case of "progressive" disability, in which the pensioner is transferred from the "non specific" class under Section 4,699, to the "specific" class under Section 4,698. But Section 4,698½ forbids any increase of pension prior to the Certificate of the Examining Surgeon establishing the same. A case of decreasing disability is the converse of this.

Those cases of a shifting degree of disability are limited, for the most part, to cases of disease, while the disability resulting from gun shot wounds and other injuries from external physical force is in most of cases of a permanent character. This is necessarily so from the difference in the nature of the two causes of disability.

It is perfectly manifest, therefore, that the case of the relator is within the exception of Section 4,698½; for the reason that he is now, and has continuously been, since he sustained his said injuries, both permanently and totally disabled, and that his case is now, and has continuously been, since discharge, both "permanent" and "specific." It has been so expressly found and adjudged by the respondent, as Commissioner of Pensions, and such finding of the fact and such adjudication have been ratified and confirmed by the Secretary of the Interior as evidenced by relator's Pension Certificate signed, sealed with the Departmental Seal, and delivered to the relator; and this Certificate is the muniment of his title, and the conclusive evidence of his right to such rate of pension as the law specifically grants for his finally adjudged condition of "permanent" helplessness "requiring regular personal aid and attendance of another person."

From what has been said, the Court will readily see that this code condensed and exemplified in these Sections, 4,698 and 4,699, together with the provisions of Section 4,698½, is

as near a perfect system of laws as it is possible for any Legislature to enact.

A graduated scale of rates of pension is thereby established, to meet the exigencies of every case, ranging from a condition of total helplessness, as illustrated by the loss of both hands or feet, down to the least pensionable disability, and without a break. Under a proper adjudication of the facts in any case and a proper administration of these wise and just provisions, there cannot be any great inequality among claimants, except as to a very limited number of persons whose exceptionally great degree of helplessness can find no adequate pension in the scale of rates, by reason of its limitation to the loss of both hands or both feet. There are a few persons on the Pension Roll, and the relator is one of them, whose disabilities dwarf that resulting from the loss either of both hands or both feet, however great may be the disability therefrom.

I submit therefore, that the Court below erred in refusing to hold and rule that the relator has a "specific" case, upon the adjudication aforesaid, under Sections 4,697 and 4,698, R. S. U. S., and in refusing to hold and rule that as a matter of legal right, he is entitled to the specific rate of $25 per month, from June 6, 1866, and $31.25 per month, from June 4, 1872, thereunder, for the degree of permanent helplessness so finally found and adjudged in his behalf.

II.

The degree of helplessness that is particularly specified in said two Sections, as entitling a claimant to $25 per month, from June 6, 1866, and $31.25 from June 4, 1872, is pensioned at the specific rate of $50 per month, from June 4, 1874, by the act of June 18, 1874, as follows:

AN ACT to increase the pension of soldiers and sailors who have been totally disabled.

See secs. 4697, 4698, R. S.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section four of the act entitled

"An act to revise, consolidate, and amend the laws relating to pensions," and approved March third, eighteen hundred and seventy-three, be so amended that all persons who, while in the military or naval service of the United States, and in the line of duty, shall have been so permanently and totally disabled as to require the regular personal aid and attendance of another person, by the loss of the sight of both eyes or by the loss of the sight of one eye, the sight of the other having been previously lost, or by the loss of both hands, or by the loss of both feet, or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of fifty dollars per month; and this shall be in lieu of a pension of thirty-one dollars and twenty-five cents per month granted to such persons by said section: *Provided*, That the increase of pension shall not be granted by reason of any of the injuries herein specified, unless the same shall have resulted in permanent, total helplessness, requiring the regular aid and attendance of another person.

See amendment act 16 June 1880.

SEC. 2. That this act shall take effect from and after the fourth day of June, eighteen hundred and seventy-four.

Approved, June 18, 1874.

While this legislation is in harmony with the system or code to which I have called the attention of the Court, by providing an equal rate of pension for equal disabilities from other causes than those that are particularly named, it, nevertheless, makes a break in the graudated scale established by the system, by failing to provide a corresponding increase of pension for the lesser degrees of disability in the specific cases. Relief as to these, is given as will be hereinafter shown.

By the act of February 28, 1877, (Pension Ll. 38), the case of the loss of one hand and one foot is entirely eliminated from this system, and placed on altogether a different basis. It is thereby provided that from thence, this double disability shall be pensioned at the rate provided by the provisions of the existing laws, for said disabilities severally.

The construction of the laws pertaining to such a case, is involved in the petition of Frank Rose, whose case is submitted herewith.

By the first proviso of Section 4,698, it is provided that the loss of a leg above the knee coupled with inability to use an artificial limb shall be rated at $24 per month. By the act of June 18, 1874, (Pension Ll. 36), it is provided that the loss of either an arm at or above the elbow, or a leg at or above the knee, shall entitle a claimant to a pension of $24 per month.

These various acts are called to the attention of the Court, in order to exhibit the history of legislation affecting "specific" cases, under the law. The thread of my argument as to the case under consideration, can be easily kept by bearing in mind that it is unaffacted by any legislation, except such as relates to that degree of helplessness that requires aid and attendance of another person.

Then comes the act of June 17, 1878, providing a further increase of pension to $72 per month, for those persons who have lost both hands or both feet, as follows:

AN ACT to increase the pension of certain pensioned soldiers and sailors who have lost both their hands or both their feet or the sight of both eyes in the service of the country.

Whereas, it is apparent that the present pension paid to soldiers and sailors who have lost both their hands or both their feet in the service of the country is greatly inadequate to the support of such as have families: Therefore,

See secs. 4697, 4698, R. S. See amendment act 3 Mch., 1879. See act 16 J'ne, 1880.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after the passage of this act, all soldiers and sailors who have lost either both their hands or both their feet or the sight of both eyes in the service of the United States, shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid to them, in the same manner as pensions are now paid to such persons, the sum of seventy-two dollars per month.

Approved, June 17, 1878.

This is an instance of unjust legislation, producing inequality, by its failure to provide a like increase from $50 to $72 per month for those equally meritorious persons who have sustained equal disability from other causes than the loss of both hands or both feet. The case at bar, of Captain Oscar Dunlap, is a striking illustration that not only an equal but a greater disability does, in fact, exist from other causes than results from the loss of both hands or both feet.

Congress saw the injustice and inequality thereby wrought and passed the act of June 16, 1880, as follows:

AN ACT to increase the pensions of certain pensioned soldiers and sailors who are utterly helpless from injuries received or disease contracted while in the United States service.

See secs. 4,687, 4,698, R. S.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all soldiers and sailors who are now receiving a pension of fifty dollars per month, under the provisions of an act entitled "An act to increase the pension of soldiers and sailors who have been totally disabled," approved June eighteenth, eighteen hundred and seventy-four, shall receive, in lieu of all pensions now paid them by the Government

of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons, the sum of seventy-two dollars per month.

SEC. 2. All pensioners whose pensions shall be increased by the provisions of this act from fifty dollars per month to seventy-two dollars per month shall be paid the difference between said sums monthly, from June seventeenth, eighteen hundred and seventy-eight, to the time of the taking effect of this act.

See act 18 June, 1874, act 3 Mch., 1879, act 17 June, 1878.

Approved, June 16, 1880.

This act by its terms applies only to those cases of "permanent" and "specific" disability of the first class, and to those cases of a "progressive" disability that had progressed into the "specific" disability of the first class prior to its passage, and then on, or entitled to be on, the Pension Roll at $50 per month under the act of June 18, 1874.

This act does not apply, and, therefore, can afford no relief, to a person whose "progressive" disability has progressed into the first class since June 16, 1880, the date of the act. In this respect it is defective legislation. But the act can have no such possible bearing on the case of the relator. It excludes from its operation only those cases that are embraced within the terms, and not the exception, of Section 4,698½, *supra*.

Between the passage of this act and that of June 17, 1878, *supra*, the arrears of pension act, so called, was passed. The case of the relator comes directly under the provisions of that act, as will hereinafter be shown.

Continuning, then, to direct the attention of the Court to the various acts that have from time to time been passed increasing the rate of pension of those persons that are classified in one or the other of the subclasses of the "specific" class, I call to the notice of the Court the act of March 3, 1879, (Pension Ll. 46,) which provides a pension of $37.50 for the loss of a leg at the hip joint. This act is also defective because of its failure

to provide a like rate of pension for equal disability from other causes. That such equivalent disability from various causes other than the loss of a leg at the hip exists is plainly evidenced by the Pension Rolls themselves.

Then comes the act of March 3, 1883, (Pension Ll. 56 and 57,) which is in perfect harmony with scheme as exemplified in said Sections 4,698, 4,698½ and 4,699. This act provides the rate of $24 per month for the disability resulting from the loss of a hand or foot, and a like rate for an equal disability from any other cause, whatever, originating in the service and line of duty; and the rate of $30 per month for the loss of an arm at or above the elbow, or a leg at or above the knee, and the like rate for an equivalent disability from other cause.

There can be no glaring inequality under the provisions of this act, upon a proper adjudication of the facts, and a rightful construction and application of the law to the cases to which it relates.

By the act of March 3, 1885, (Pension Ll. 66,) the loss of an arm at the shoulder joint is rated at $37.50 per month, the same rate that is provided for the loss of a leg at the hip joint by the prior act of March 3, 1879, *supra*, and has the same defect therewith, of making no provisions for a like rate for an equal degree of disability from other cause.

And finally comes the act of August 4, 1886, further increasing the rate for loss of hand or foot to $30 per month, for the loss of an arm at or above the elbow, or a leg at or above the knee to $36 per month, and for the loss of an arm at the shoulder joint or a leg at the hip joint, or so near the joint as to prevent the use of artificial limbs, at $45 per month (Pension Ll. 68).

This act also fails to make provisions for equivalent disabilities, and in this respect it fails to do impartial justice to equally meritorious claimants who are equally disabled from causes originating in the service and line of duty.

And thus the Court will observe that the rate of pension in

each of the sub-classes of the "specific" class has been increased from time to time until now all the provisions of Section 4,698, which apply only to the "specific" cases, have been superseded. While this is true of the "specific" cases, the provisions of Section 4,699, which apply to the "non specific" class have remained continuously the same. The result of the various acts of legislation referred to, is to greatly impair the graduated scale established by said Sections 4,698, 4,698½ and 4,699, as aforesaid, there being now a hiatus between the "specific" and the "non specific" classes, with respect to the rate of pension. The simple amendment of Section 4,699, by striking out the word "eighteen" in the first line, and, in lieu inserting the word "thirty," and so amending the said act of June 16, 1880, as to provide a like rate of $72 per month for those cases of "progressive" disability that have since its passage progressed into such a degree of helplessness as to require aid and attendance, and so amending the said act of August 4, 1886, as to make provision for a like pension for equivalent disabilities to those severally mentioned in the act, would not only restore the symmetry of the system to what it formerly was, but would also re-establish the scale of rates so as to be in complete harmony with the requirements of exact justice and equality.

I have thus, at this considerable length, gone into a general discussion of the Pension Laws, because of the great importance of the case of the relator. Nothing can be of more vital interest to the people of the United States than the proper and rightful administration of these laws, under which the enormous sum of $70,000.000 is annually disbursed from the public treasure.

III.

It will be observed that these laws make no provision for, and do not contemplate any increase in the rate of pension in any case of "permanent" and "specific" disability, except as

expressly provided by Congress. In other words, the rate of pension is specifically fixed from time to time by the law in every possible case of "permanent" disability of the "specific" classes. In such a case a claimant would have no ground on which to base a claim for increase of pension, for he is either in receipt of the rate specifically provided by the law, or he is not, and if not, then he is entitled to be as a matter of legal right, and the Commissioner of Pensions has no judgment to exercise in the premises. His discretionary powers cease with having resolved that the claimant incurred the alleged disability from causes originating in the service and line of duty, and with having finally found that the degree of disability is that specified in one or the other of the specific classes. The law directs what the rate of pension shall be.

The relator has never applied for an increase of pension. He never could, for an increase of pension is predicated of an increase of disability, and his is, and always has been "permanent" since his discharge. An application for an increase of rate because of some act of Congress increasing the rate for the "specific" disability the claimant has, is not an application for an increase within the meaning that the Commissioner of Pensions can exercise any judgment or discretion in the premises. The claimant is simply demanding what Congress has ordained he shall have for the particular disability he has been finally adjudged to have, and to have incurred in the service and line of duty.

Now the relator has three distinct disabilities from three distinct causes, namely, the loss of the right hand, the loss of the right foot, and the fracture of the skull and left jaw resulting in epilepsy, and the permanent impairment of his mind and memory. There is nothing doubtful or uncertain about these causes. They are of such a character as to be severally upon to ocular demonstration.

The respondent, in discharge of his official duty as Commissioner of Pensions, has found the relator to have from these combined disabilities, the particular degree of helplessness

specified in the law as entitling a claimant as a matter of legal right to a rate of $25 from June 6, 1866, $31.25 from June 4, 1872, and $50 from June 4, 1874, under the provisions of Sections 4,697 and 4,698, and the act of June 18, 1874, *supra*.

The relator at the time he sustained these injuries, held the rank of Captain, and for either of the said disabilities he was entitled to the full pension of a Captain, viz: $20 per month, and could receive no more for all combined until June 6, 1866. But he never applied for pension for, and on account of his head injury until June 26, 1880. The respondent states, that on that day he did file his claim on account thereof.

Although a pension, as held by this Court, is a gratuity on the part of the Legislature, nevertheless a claimant therefor, has a claim against the Government; and to the extent only of his claim can a pension be granted, though it may clearly appear from the official records that the claimant has other good and independent grounds for a pension than set forth in the application. Hence if a claimant had, as a matter of fact, lost both hands or both feet in the service and line of duty, and even if the hospital record and the records of the Adjutant General's Office should conclusively show the loss of both, nevertheless, in case he applied for a pension for the loss of but one of these members, the Pension Office could only grant pension in response to such claim, for such single loss. It is no part of the duty of the Commissioner of Pensions to gratuitously give pensions, or to grant them at all, except upon a claim setting forth the disability or disabilities, and specifically stating the cause or causes of the same.

It is wholly immaterial whether the failure or neglect of the relator to apply for a pension as well for and on account of the head injury as the loss of the hand and foot, was through ignorance of the law, inadvertence, or by design. In any event his claim to arrears of pensions on account thereof was barred by the limitations of the Pension Laws (unless the relator is specially exempt from their operation by reason of the said head injury and the results thereof, and, in the absence of judicial

proof to the contrary, this Court must assume that the relator is fully capable of acting for himself), at the expiration of five years from the time (date of discharge) the right accrued. Section 4,709 (Pension Ll. 69), now repealed.

But all bar was entirely removed by the arrears of pension act, *supra*, and a new limitation is fixed thereby. It is expressly provided in the act of March 3, 1879, amendatory of the arrears of pension act, as follows:

"SEC. 2. All pensions which have been, or which may hereafter be, granted in consequence of death occurring from a cause which originated in the service since the fourth day of March, eighteen hundred and sixty-one, or in consequence of wounds or injuries received, or disease contracted since that date, shall commence from the death or discharge of the person on whose account the claim has been or is hereafter granted, if the disability occurred prior to discharge; and if such disability occurred after the discharge, then from the date of actual disability, or from the termination of the right of party having prior title to such pension: *Provided*, The application for such pension has been or is hereafter filed with the Commissioner of Pensions prior to the first day of July, eighteen hundred and eighty, otherwise the pension shall commence from the date of filing the application; but the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under sixteen years of age.

"SEC. 3. Section forty-seven hundred and nine of the Revised Statutes is hereby repealed."

There is nothing in this law that makes the right to arrears of pension depend upon the consent, assent or approval of the Commissioner of Pensions. No Court is authorized to construe the law, for it is couched in such plain language that one person can understand its meaning as well as another. The act is mandatory and binds the Commissioner of Pensions.

Now let us see what the law says about the rating of the claimant, whom we will take to be the relator, under the arrears of pension act. It is couched in the same simple

language, not calling for interpretation or construction at the hands of the Court. It is:

"That the rate at which the arrears of invalid pensions shall be allowed and computed in the cases which have been or shall hereafter be allowed, shall be graded according to the degree of the pensioner's disability from time to time, and the provisions of the pension laws in force over the period for which the arrears shall be computed."

The rate for arrears of pension shall be "according to the degree of the pensioner's disability from time to time, and the provisions of the pension laws in force over the period for which the arrears shall be computed," and not according to the judgment of the Commissioner of Pensions. I am speaking now of "permanent" and "specific" cases, and not of cases of "progressive" disability, as to which the law is also plain.

Now can any legal proposition be plainer than that Captain Oscar Dunlap, the relator, is entitled to arrears of pension according to the degree of his disability and the provisions of the pension laws in force over the period since the date of his discharge: *Provided*, He had an application pending therefor, or filed his application with the Commissioner of Pensions prior to July 1, 1880?

What then is the difficulty? It is this: While the respondent has expressely found the fact to be, and has accordingly and finally adjudicated the case of the relator, that his disability is "permanent" and what the law contemplates to entitle a claimant to be rated in the first class, he has undertaken to give his legal reasons why the petitioner cannot be allowed arrears of pension beyond the date of the medical examination of May 25, 1881, and those alleged reasons are not that the relator did not file his claim prior to July 1, 1880, the date specified in the law, but that he did not prefer his claim prior to June 16, 1880, a date no where mentioned in the arrears of pension act or in the amendatory act of March 3, 1879. The respondent admits that the relator now has and has continuously had since discharge the requisite degree of helplessness to entitle him to a

rating in the first class, but gives what he supposes to be legal reasons why arrears of pension cannot be granted prior to the medical examination. And thus there is presented in this case a pure question of law, involving the construction and application of the arrears of pension act amended as stated.

Now if the relator had filed his claim after July 1, 1880, then by the express language of the law "the pension shall commence from the date of filing the application," and not from the date of the Surgeon's certificate.

In what kind or sort of a case does the increase relate to the date of the certificate of the Examing Surgeon? It is not a case like that of the relator, as it, in fact, exists, and, in fact, found to exist by the respondent himself.

Section 4,698½, R. S., U. S., expressly excepts "cases of permanent specific disabilities" from its provisions that "no increase of pension shall be allowed to commence prior to the date of the Examining Surgeon's certificate establishing the same." The reason why the law excepts "permanent specific" cases from this provision is, first, the law itself fixes the date and commencement of the increase; second, there can be no "increase" of disability in a "permanent" case, and, third, there can be no "increase" of disability in a "permanent" case to be "established" by the certificate of the Examining Surgeon.

How can the Surgeon's certificate "establish" an "increase" of disability in a "permanent" case like that of the relator? The disability of the relator is "permanent," and not of a "progressive" character, and so the respondent has expressly found, adjudged and ruled in the adjudication hereinbefore given in full.

But in a case of "progressive" disability, where the claim is that the disability has so far increased as to entitle the claimant to a higher grade of pension, the law has fixed the date of increase, if the claim be allowed, to commence from the date of the Examining Surgeon's certificate establishing such increase of disability. And this is eminently fair and just

legislation. No better date could be fixed in the law for the commencement of the increase of pension in such a case. Indeed, no other date could well be fixed.

Now, drawing the line still closer around the relator's case, as made out by the respondent himself, let us suppose he had never applied for pension at all until June 26, 1880, the date he filed his original application for and on account of the disability resulting from this terrible head injury; that on that date he filed his first claim for pension, in which he had set forth his military services, and had alleged that while in such service, and in the line of duty, giving date and stating all the facts and circumstances, he had sustained such wounds and injuries as resulted at the time thereof in the loss of his right hand and right foot, the fracture of the skull and left jaw, resulting in epilepsy and the permanent impairment of his mind and memory, whereby he became so totally and permanently disabled as to be utterly helpless, or so nearly so as to require regular aid and attendance of another person, and, accordingly, claimed pension under the arrears of pension act, from the date of discharge. And let us further suppose that the respondent had made in the supposed case the same adjudication he has made in the case as it actually exists (and he could not have made any other honest adjudication), can there be any sort of doubt as to the right of the relator to pension from date of dischage for his utter helplessness, requiring regular aid and attendance of another person, from the combination of these three causes? The law so expressly provides, and declares that the pension "shall be graded according to the degree of the pensioner's disability from time to time, and the provisions of the pension laws in force over the period for which the arrears shall be computed." And is the petitioner in a worse situation by having been pensioned for the disability resulting from the loss of the right hand and right foot, than he would be had he not been pensioned at all? This appears to be the view the respondent takes of the law. And ought not the respondent to be set right by the Court? Isn't the position

taken by him wholly untenable in the law? And does it not refuse justice and the equal benefits of the law to the relator? Does not the position taken by the respondent in effect deny to the petitioner all benefits of the arrears act, while conceding his case to be within the terms of that act? What better or more cogent reasons can this Court want to justify, not only the granting of the alternative writ, but the peremptory writ of mandamus in this case, than are contained in this adjudication by the respondent? Does not the respondent therein undertake to apply the law and doctrine of estoppel, other than the limitations contained in the law, against the petitioner? And ought not a mandamus to issue on this account to disabuse the respondent's mind of such false notions respecting the Pension Laws?

Does not the respondent, while conceding the relator to have the degree of disability contemplated by the law, and to have filed his application June 26, 1880, nevertheless set up another and different date from that mentioned in the law as the date of commencement of arrears of pension for the relator? And ought not the alternative writ to issue on this account? What matters it whether the relator received his pension for the loss of the hand and foot, under the act of February 28, 1877, with or without "questioning or demur?" Had he any rights to save or lose by "demurring" or failing to "demur" to the action of the Pension Office? Do not the statutes create all the rights the relator enjoys with respect to his pension? And do not these same statutes prescribe the conditions and limitations on which these rights shall be enjoyed? And is there any other condition prescribed therein than that the relator shall have filed with the Commissioner of Pensions his claim before July 1, 1880? And can the respondent add other, and different conditions, to wit: that the relator should have filed his claim before June 16, 1880? And will not a mandamus lie to compel the respondent to discharge his ministerial duties, that are defined in the law, and by the law enjoined upon him as Commissioner of Pensions,

no matter whether his refusal be wilful, or through honest mistake? I assume the respondent is honest in the reasons or pretended reasons he gives for his refusal to reissue the relator's certificate. The law implies tort.

The respondent in his ruling in this case refers to the decision of Secretary Kirkwood in the case of Whitehead, but does not state the facts, and the facts not appearing, the presumption is that the decision was correct. But if the case of Whitehead be like that of the relator, namely: a case of "permanent specific" disability, entailing such a degree of helplessness as to require regular aid and attendance of another person, and he had an application pending at the date of the passage of the arrears of pension act and of the amendatory act of March 3, 1879, or had filed with the Commissioner of Pensions such application before July 1, 1880, and a like adjudication of the facts had been made in that case with what the respondent has made in this case, and nothing remained to be done but to fix upon the rate and commencement of pension, as specifically named in the law, as in the case at bar, then, and in such case, if Secretary Kirkwood ruled as a matter of law that Whitehead was not entitled to a rating in the first class, and at the rates claimed by relator in his petition, the Secretary did not rule according to the law.

There are some things in the law that we can know; and we can and do know that Captain Oscar Dunlap, the petitioner before the Court, upon the very adjudication made by the respondent that is set forth in the petition, is entitled under the law to just what he claims. There is no chance for doubt, uncertainty or for mistake in this. All that is requisite to an absolute knowledge of this legal right on his part, is to know the Pension Laws themselves.

To further illustrate the absolute right of the relator to what he claims, let us suppose the case of the loss of both hands in the service and line of duly. The claimant for pension either through ignorance, accident or design, applied for pension for the loss of but one hand. Upon such an application the Pen-

sion Office could not grant a pension for the loss of both hands, for that would be in excess of the claim made upon the Government. The claimant accordingly is pensioned for the disability resulting from the loss of but one hand, and rated at $15 from June 6, 1866, $18 from June 4, 1872, under the provisions of said Sections 4,697 and 4,698, R. S. U. S. Time has run on and the pensioner is barred by the limitations of Section 4,709, R. S. U. S. (now repealed by the arrears act) to claim arrears of pension on account of the disability from the loss of the other hand. But by the arrears of pension act and the amendatory act of March 3, 1879, all bar is removed to claim arrears of pension, and a new limitation is thereby established. Now let us suppose that under and within the terms of the arrears act the claimant prefers an original claim for the loss of the other hand, and the two applications and the papers on file constitutes the record in the case. Is there any doubt about the right of such a claimant to arrears of pension for the entire disability and to the rate specifically provided by law for this degree of utter helplessness? Nor is it any answer to say: "But the law particularly pensions the disability resulting from the loss of both hands at $25 from July 4, 1864, $31.25 from June 4, 1872, $50 from June 4, 1874, and $72 from June 17, 1878," for the law grants these rates in no case except one of "total and permanent helplessness," requiring aid and attendance, no matter what the cause of the disability is; and it is expressly provided in the proviso of the said act of June 18, 1874: "That the increase of pension shall not be granted by reason of any of the injuries herein specified (loss of both hands or both feet or any other injury), unless the same shall have resulted in permanent, total helplessness, requiring the regular aid and attendance of another person." (Pension Ll. 35, 36.)

It is true that the laws in some instances assume that the loss of both hands or both feet will necessarily result in this degree of helplessness. But it is the degree of helplessness that is pensionable at these rates, and not the cause of the helplessness. And the law addresses itself to this helpless condi-

tion, and is interested in the cause thereof to the extent only of knowing that it originated in the service and line of duty. It follows that all cases of " permanent and total " helplessness requiring regular aid and attendance of another person, resulting from whatsoever cause originating in the service and line of duty, are on a plane of equality in the eyes of the law.

This supposed case is in principle precisely the same as that of the relator.

Now if the petitioner had never applied for any pension at all for his said disabilities until June 26, 1880, can there be any doubt that the respondent, upon the same adjudication he has made would have granted him arrears of pension from date of discharge, and according to the degree of helplessness shown and the law covering the intervening period?

To have done otherwise would have been in disregard of the plain language of the arrears of pension act, and the amendatory act of March 3, 1879, and I cannot suppose, much less believe the respondent would be guilty of this. But how are the rights of the petitioner to be in any way abridged or predjudiced in the premises, by the fact that during this period he was pensioned for a part only of his pensionable disabilities? There is no estoppel to be applied, for all the rights herein of the relator are statutory. They are expressly created by the law, and the creator of those rights has expressly declared the terms and conditions on which they shall be enjoyed, and I have shown that the case at bar is strictly within such terms and conditions.

From the very nature of the functions to be performed by the Commissioner of Pensions in a claim for pension for a " permanent specific " disability, there must be a point in the stage of proceedings somewhere, at which all discretionary powers of the Commissioner cease, and his ministerical duties begin. That point manifestly is attained whenever the Commissioner shall have determined that the claimant has a case of " permanent specific " disability, and that the same results from a cause originating in the service and line of duty, and

has further determined to which of the "specific" classes the case belongs. The law directs what shall thereafter be done. But in the case before the Court there is no need of hair splitting, nor indulging in efforts at fine distinctions. The relator has his *deed*, his *patent*, his *Pension Certificate*, signed, sealed and delivered, and that instrument is the evidence not only of the final adjudication of his case by the respondent, but such adjudication is ratified and confirmed by the Secretary, and now beyond the recall or further control of the respondent or anyone else, except as provided by Section 3, act of June 21, 1879, (Pension LI. 46); and this provision of the law could, under no circumstance less than a case of fraud or clear mistake in the adjudication of the claim, be held to justify the withholding from the relator the arrears of pension he has so finally been adjudged to be entitled to have. The objects and purposes of the arrears act as amended by the act of March 3, 1879, are not to be thwarted by a mere pretense in any case. In the case of Dunlap, however, the respondent does not pretend that any mistake has been made, or that there is any suspicion of even the taint of fraud. The causes of his utter helpless condition being open to ocular proof, preclude all possibility of fraud or mistake. There is nothing lacking as to the merit of this case. The only question involved is one of law. And for the reasons above given, I respectfully submit to the Court that manifest error hath occurred to the prejudice of the relator, and that the Court below ought to be reversed with directions to grant the petitioner's motion for a rule on the respondent to show cause, if any he has, why the peremptory mandamus should not issue as prayed.

Of so great importance is this case, not only to claimants for pension, but to the government itself, I crave still further the indulgence of the Court.

In bringing this suit I had not lost sight of the fact that there are 500,000 pensioners on the Pension Roll, among whom, no doubt, many have imaginary or real grievances to redress,

and I have considered what would be the probable influence upon these dissatisfied pensioners in case a mandamus should issue in this case. Without admitting that such considerations ought to actuate, in the least degree, a court of justice sworn to administer the law, I have come to the conclusion that a great benefit would accrue to the United States and to meritorious claimants by a thorough discussion of the Pension Laws before the Courts, and by a carefully prepared opinion interpreting and construing these laws. While it is true that in this particular case the object is to recover money from the United States, it is equally true that the construction of the Pension Laws I have herein contended for would, if adopted by the Pension Office, save many thousand dollars per annum to the government. This fact is made apparent from a careful inspection of the Pension Rolls, themselves, which contain the names of many pensioners rated in the first class for a degree of disability far short of the actual standard required by the law, and but approximately that of the relator. Surely we all ought to be deeply interested in the correct interpretation and construction of these laws, in the administration of which the enormous sum of $70,000,000 of the public treasure are annually disbursed.

There need be no fear of the Court below, that it will be overrun with applications for mandamus, if the writ should issue in this case. No lawyer would be at all likely to bring such suit until he had made himself familiar with all the cases for mandamus that have been argued and determined in this Court from Marbury *vs.* Madison to the present day, and until he had thoroughly examined into the facts, and found he had, at least, a good *prima facie* case. A claimant may have just cause to complain, and yet be without legal redress, or any redress except that of appeal to the Secretary, which is not always very satisfactory.

I strongly suspect that the Court below imagined that it would be flooded with like applications, if encouragement had been held out in this by granting the motion for the alternative

writ, and that it was this nightmare that finally induced that Court to refuse the motion, for, certainly, the Court must have been satisfied that the relator had made out, at least, a good *prima facie* case, which was sufficient to entitle him to a hearing on the merits of his petition.

This case and that of Rose and also of Miller submitted herewith, are *ex parte* proceedings here. The cases are nominally here on writ of error to the Court below on final judgment, nevertheless, the cases are not here on their merits, except as to the preliminary motion for a rule on respondent. And it is very important to the petitioners that a speedy hearing and determination be had of their said motions, severally made in their respective cases. The necessity for this is apparent from the uncertainty of the continuance of the respondent in the office of Commissioner of Pensions.

Although in each case the relator has given bond to the respondent and cited him to appear at the October term 1888, of the Court, the respondent nevertheless is not in court, and cannot be brought into court in this manner. The sole purpose for giving bond and citing the respondent to appear, was to avoid all questions, and to subject ourselves fully to the jurisdiction of this Court, to abide by and perform its judgment in all the premises. Any order, judgment or decree the Court may make looking to argument on the subject matter of these three several petitions, in which counsel for the respondent as well as for the several petitioners may be heard, will be cheerfully obeyed and executed. The only thing these several relators want, is that the law shall be correctly administered in their behalf.

J. G. BIGELOW,
Attorney for petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 991.

THE UNITED STATES EX RELATIONE OSCAR DUNLAP, PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS.

In Error to the Supreme Court of the District of Columbia.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 991.

THE UNITED STATES EX RELATIONE OSCAR DUNLAP, PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS.

In Error to the Supreme Court of the District of Columbia.

BRIEF IN REPLY TO DEFENDANT IN ERROR.

It cannot be well determined whether a mandamus will or will not lie in a given case without first knowing what that case is. It is important, therefore, to know at the threshold of the inquiry what the case is of Oscar Dunlap, as made by his petition. It cannot be summarized in the language employed in the brief for defendant in error, namely: "This is an application for a mandamus to compel the Commissioner of Pensions to increase the rate of the relator's pension." On the contrary, the petition proceeds upon the ground that the respondent, as Commissioner of Pensions, has nothing whatever to do with the question of the rate of the petitioner's pension; that Congress has declared by law what shall be the rate of his pension, from

time to time, since the date of his discharge from the military service, and fixed the dates at which the increase shall commence; that it does not lie in the power of the Commissioner of Pensions to substitute a different and less rate, nor to fix upon a different date for the increase than is specifically declared in the law.

And the complaint of the relator is that the respondent, as Commissioner of Pensions, has substituted his will for the will of the Legislature, as clearly expressed in the law.

The case may be summarized as follows: *This is an application for mandamus to compel the respondent, as Commissioner of Pensions, to reissue the relator's pension certificate with such rates as the law specifically commands for the degree of permanent disability he has been finally adjudged by the respondent in the exercise of his official duties, as such Commissioner, to have, and which is evidenced by the certificate he now holds.*

It is an application for mandamus to compel the performance of a simple ministerial duty, which the law, in plain terms, enjoins, and not to compel the respondent to perform a single act in which the exercise of judgment or discretion is involved. The case has already passed through the stage of official duty. It is now under the shadow of the law, and its mandate rests upon it. All the respondent has to do is to obey that mandate. And obedience to the law can scarcely be called an *official* duty, since it is the duty of all persons to obey the law. All good citizens do obey the law.

The disability of the relator results from three separate and independent causes, namely, the loss of the right hand, the loss of the right foot, and fracture of the skull and left jaw, resulting in epilepsy and the permanent impairment of his mind and memory. These injuries were incurred at the same time in the military service and line of duty while he was a captain in the 26th Illinois Volunteers. He made his application for an invalid pension on account thereof June 26, 1880. On that application he was finally adjudged

by the respondent in the discharge of his official duties—that is, in the exercise of his official judgment and discretion—to be "totally and permanently helpless, requiring from thence until now the regular aid and attendance of another person," from the said three causes combined. (Record, pp. 4 and 5.) This degree of disability, so found to exist by the respondent in the case of the relator, is expressly pensioned by law at $25 per month from June 6, 1866, by the following provision of section 4697, Revised Statutes U. S., viz: "Or who shall have been otherwise "so totally and permanently disabled as to render them "utterly helpless, or so nearly so as to require regular per-"sonal aid and attendance of another person, SHALL BE "ENTITLED to a pension of twenty-five dollars per month." This same degree of disability is expressly pensioned by law at $31.25 per month from June 4, 1872, by the following provision of section 4698, Revised Statutes U. S., viz.: "Or otherwise so permanently and totally disabled as to "render them utterly helpless, or so nearly so as to require "the regular personal aid and attendance of another person, "SHALL BE ENTITLED to a pension of thirty-one dollars and "twenty-five cents per month." (Pension Ll., pp. 6 and 7.)

This same degree of disability is expressly pensioned by law at $50 per month from June 4, 1872, by the following provision of the act of June 18, 1874, viz: "Or by any other "injury resulting in total and permanent helplessness, SHALL "BE ENTITLED to a pension of fifty dollars per month; and "this shall be in lieu of a pension of thirty-one dollars and "twenty-five cents per month granted such person by said "section" (Pension Ll., p. 35), and this same degree of disability is expressly pensioned at $72 per month from June 17, 1878, by the operation of the act of June 16, 1880 (Pension Ll., p. 47).

Thus it clearly and plainly appears that the degree of helplessness of the relator entitles him to the above rates, provided he had filed his claim with the Commissioner of

Pensions prior to July 1, 1880 (section 2, act of March 3, 1879, Pension Ll., p. 45), but he filed his claim with the Commissioner of Pensions June 26, 1880 (Record, p. 4).

Nor yet is this all. The relator has his certificate at $50 per month, the rate expressly provided for his said degree of helplessness by the said provision of the act of June 18, 1874. This certificate "is *prima facie* evidence of his title "to the pension and of all the facts that make his title" (4 Ct. Cl., 219). Title to what pension? Why, to the very pension the law declares he shall be entitled to for the very same degree of disability that is thus evidenced by his certificate, namely, to $25 from June 6, 1866; $31.25 from June 4, 1872; $50 from June 4, 1874, and $72 per month from June 17, 1878.

But what does the respondent say? He says, in effect, that the relator shall not have all the above rates in succession, as the law provides, but the rate only of $50 per month, and that he shall have that rating not from June 4, 1874, as the law directs, but from May 25, 1881. What reasons does he give? Not that the relator did not file his claim "with the Commissioner of Pensions prior to the first day "of July, eighteen hundred and eighty," as the law provides, and which he did, but that he failed to file his claim on or before June 16, 1880, a date nowhere mentioned in the arrears of pension act and the supplemental act of March 3, 1879, nor in any other law or act of Congress.

And thus is presented the mandatory terms of the law on the one hand, while, on the other, the arbitrary will of the Commissioner of Pensions. The relator, as the case stands, is rated not as the law in plain terms directs, but according to the will of the respondent. And are we to be told that the law affords no remedy to right the wrongs of this maimed and utterly crippled veteran? That the law is powerless, the courts are powerless, to constrain the respondent to obey the mandate of the law? Can the Commissioner of Pensions with impunity substitute his will for that of the law-

making power of the Government? Is the head of this bureau amenable to the laws of his country, or is he a law unto himself?

And thus it plainly appears that the court is not invited by the relator's petition to interfere in any manner or form with the executive duties of the respondent as Commissioner of Pensions. On the contrary, the prayer of the petition is for the peremptory writ of mandamus to compel the respondent to perform a ministerial act—an act which the law commands; and the question is: Will a mandamus lie to compel obedience to the law? Let us examine this question in the light of the opinions of this Court in a number of cases.

On June 7th, 1794, Congress passed the following act:

"AN ACT CONCERNING INVALIDS.

"*Be it enacted by the Senate and House of Representatives of the* "*United States of America in Congress assembled,* That the "Secretary of the War Department be, and he is hereby, "directed to place upon the list of invalid pensioners of the "United States all persons who have been returned as such "by the judges of the several districts under the act of Con- "gress of the twenty-eighth of February, one thousand seven "hundred and ninety-three, intituled 'An act to regulate the "claims to invalid pensions,' and who by legal proofs are "by him found to come clearly within the provisions of the "said act and are reported as having complete evidence of "their claims in the report of the said Secretary upon that "subject made to Congress the twenty-fifth day of April, "one thousand seven hundred and ninety-four; and all per- "sons placed by virtue of this act on the list of invalid pen- "sioners shall receive such sums as the returns of the district "judges have respectively specified, and be paid in the same "manner as invalid pensioners are paid who have been "heretofore placed on the list: *Provided,* That every com- "missioned officer who shall by virtue of this act be placed

"on the pension list as entitled to a sum less than a full "pension shall receive such pension only upon compliance "with the same rule respecting a return of the commutation "which he may have received as is provided for in the case "of Captain David Cook by an act of Congress passed De- "cember the sixteenth, one thousand seven hundred and "ninety-one."

(1 Stat. at Large, pp. 392 and 393.)

The above act is the law referred to by Chief Justice Marshall in the case of Marbury *vs.* Madison (1 Cranch, 164), in which his honor said: "By the act concerning invalids "passed in June, 1794, vol. 3, p. 112, the Secretary of War "is ordered to place on the pension list all persons whose "names are contained in a report previously made by him to "Congress. If he should refuse to do so, would the wounded "veteran be without remedy? Is it to be contended that "where the law in precise terms directs the performance of "an act in which an individual is interested the law is in- "capable of securing obedience to its mandate? Is it on "account of the character of the person against whom the "complaint is made? Is it to be contended that the heads "of Departments are not amenable to the laws of their "country?"

Did the act of June 7, 1794, making provisions for pensioning the "wounded veterans" of the Revolution, impose any greater obligations upon the head of the War Department to execute its mandate in that behalf than do the acts of Congress of June 6, 1866 (section 4697), of March 3, 1873 (section 4698), of July 18, 1874 (Pension Ll., p. 35), of June 17, 1878 (Pension Ll., p. 42), of June 16, 1880 (Pension Ll., p. 47), and the arrears of pension act of January 25, 1879, and the amendatory act of March 3, 1879 (Pension Ll., pp. 43, 44, and 45), making like provisions for this wounded veteran of the late rebellion, upon the Commissioner of Pensions?

The principle is the same. The duty imposed by the law in each case is the same. In each case all executive duty has been performed. What remains to be done the law in plain terms enjoins.

There are so many sound principles stated in the Marbury case the Court will pardon me for calling further attention to some of the utterances by Chief Justice Marshall.

At page 166 it is laid down: "But when the Legislature "proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; *when the "rights of individuals are dependent on the performance of those "acts, he is so far the officer of the law*—is amenable to the laws "for his conduct, and cannot at his discretion *sport away the "vested rights of others.*"

"The conclusion from this reasoning is that where the "heads of the Departments are the political or confidential "agents of the Executive, merely to execute the will of the "President, or rather to act in cases in which the Executive "possesses a constitutional or legal discretion," nothing can "be more perfectly clear than that their acts are only polit-"ically examinable. *But where a specific duty is assigned by "law, and individual rights depend upon the performance of that "duty*, it seems equally clear that the individual who con-"siders himself injured has a right to resort to the laws of "his country for a remedy."

Although this entire opinion, save so much of it as holds that this Court has no original jurisdiction in a case for mandamus, is extrajudicial, it has, nevertheless, been constantly referred to as an authority.

In the recent case of the United States *ex relatione* McBride *vs.* Carl Schurz (12 Otto, 378) the principles and doctrines laid down by Chief Justice Marshall that were applicable to the questions involved in that case are, by the Court, adopted in the very language used to enunciate them, and declared to be the law. Time and again has this Court referred to this extrajudicial opinion in the case of Marbury

vs. Madison, and declared the law to be correctly expounded therein. Not a single proposition of law laid down by Chief Justice Marshall in the opinion has ever been controverted. On the other hand, nearly every proposition contained therein has since then been repeatedly adopted by this Court as the law. And now I come to ask your honors to adopt the language of the opinion that I have quoted and to declare the proposition therein laid down as the law in the case of the relator, Captain Oscar Dunlap, the "wounded veteran" of the late civil war. And I have an idea the Court will do so, because it has never refused in any case for mandamus against an executive officer of the Government to grant the writ when it was perfectly clear, as in this case, that the duty, the performance of which is sought to be enforced, was of a purely ministerial character.

In reply to the argument, page 5 of defendant's brief, I deny that the object of this writ of error is to ask this Court to take the administration of the pension laws out of the hands of the Commissioner of Pensions, where Congress has placed it, and give the relator the benefit of a judicial administration of the pension system.

This kind of argument has often been made before in this Court in opposition to the allowance of the writ of mandamus. It was vehemently made in the case of Stokes *vs.* Kendall, Postmaster General (12 Pet., 524); but in that case it proved of no avail. It never prevails in a case where the duty sought to be enforced is clearly enjoined by the plain terms of the law.

An examination of the petition in this case will clearly show that the Court is asked in no manner to interfere with the official duties of the respondent as Commissioner of Pensions, nor in any way to take into its own hands the administration of the pension system.

Let us examine this charge: The duties of the Commissioner of Pensions are divided into two classes, namely, those duties that involve the exercise of official judgment and dis-

cretion and pertain to his official character as Commissioner of Pensions, and, secondly, that other and distinct class of duties, the execution of which the law enjoins upon him "as the officer of law"—in the language of Chief Justice Marshall—rather than as the Commissioner of Pensions.

The laws of Congress confide the execution of the former to the judgment and discretion of the respondent as such Commissioner of Pensions, and the judicial department of the Government shall not interfere in any manner with the performance thereof. These discretionary duties in the case of the relator, and in which the Court cannot intermeddle without invading the domain of a co-ordinate branch of the Government, consist, or consisted, of a series of quasi-judicial acts, namely: First. Whether the application for pension was in due form—that is, whether it was executed as required by law. Second. Whether the claimant has, by his evidence, established his identity. Third. Whether he has the disability he alleges. Fourth. Whether that disability results from causes originating in the military service and line of duty. All of these questions call for evidence, testimony, proofs, the construing of the same, and involve the finding of the facts in the case established by such evidence, in conjunction with the claimant's record in the Adjutant General's Office and the Surgeon General's Office. And having resolved all these questions in the claimant's favor, the further question arises: Fifth. What is the degree of disability in the case—whether it entitles the claimant to a classification in one or another of the "specific" classes, or to a classification in the "non-specific" class covered by section 4699, Revised Statutes? Sixth. If in one of the specific classes, then which one? Seventh. But if in the "non-specific" class, then what shall be the rate of pension?

In resolving these questions, which necessarily enter into the adjudication of every claim for invalid pension under the general pension laws, the exercise of judgment and dis-

cretion is called for, and the Court cannot lawfully interfere to control that judgment and discretion. Congress has by law placed the execution of these duties in the hands of the Commissioner of Pensions, subject only to the supervisory powers of the Secretary of the Interior.

Now, by referring to the petition in the case, the Court will see that it is distinctly alleged that all these duties have been performed in the case of the relator, and that these acts of the Commissioner have been ratified and confirmed by the Secretary, and that all the premises is evidenced by his certificate, signed, sealed, and delivered.

The charge, then, that the Court is asked by the petition "to take the administration of the pension laws out of the hands of the Commissioner of Pensions, where Congress has placed it," is absolutely untrue. There is absolutely no foundation for the charge to rest upon. The utmost care was taken in this and the other two cases of Rose and Miller to distinguish between those duties appertaining to the respondent's office and those other duties which the law requires him to perform, not as Commissioner of Pensions, but rather "as the officer of the law," and Congress has never confided these latter duties to any executive officer to be performed or not as shall suit his pleasure—"at his discretion to sport away the vested rights of others." And, what is still better, Congress has no power under the Constitution to enact any such law. It would create an unbridled tyrant amenable to no law.

The case of the relator is simply this: The law in plain terms declares that "he shall be entitled" for the very degree of disability he has been finally adjudged to have incurred in the military service and line of duty, and which adjudication is evidenced by his certificate to a pension at $25 from June 6, 1866, $31.25 from June 4, 1872, $50 from June 4, 1874, and $72 per month from June 17, 1878.

The respondent, "as the officer of the law," refuses to obey its mandate, substitutes his own will for that of the law-

making power, and reissues the certificate at $50 from May 25, 1881, and "the genius of man can devise no shift" to take the case from under the charge I thus place upon it.

This Court is asked to interfere in the manner and to the extent that Chief Justice Marshall plainly and unmistakably intimated that it is the duty of the Court to interfere to prevent the respondent "at his discretion from sporting away the vested rights" of the relator.

Your honors are asked to interfere in this case for the reasons given for the interference of the Court in the case of Amos Kendall, Postmaster General, *vs.* The United States *ex relatione* William B. Stokes *et al.* (12 Pet., 524) and to the same extent the Court interfered in that case; for the reasons given for the interference of this Court in the case of The United States *ex relatione* McBride *vs.* Carl Schurz, Secretary of the Interior (12 Otto, 378), and to the same extent and in the same manner the Court interfered in that case, namely, to the extent of compelling the respondent, "as an officer of the law," to obey its mandate; and for the reasons given for the interference of the Court in the case of Ben. Butterworth *vs.* The United States *ex relatione* Hoe (112 U. S., 50). And did this Court, in awarding a mandamus in these cases, take out of the hands of the Postmaster General, the Secretary of the Interior, or the Commissioner of Patents "the administration" of the laws Congress had confided to them? Did the Court in any way interfere with their executive functions? The command that issued forth was that they obey the mandate of the law, and that is all that is prayed for in the case of the relator, and the case cannot be made to appear in any other light.

Further replying to the argument, page 6, of defendant's brief, I maintain that whether the mandate of the law enjoining the ministerial act the respondent is sought to be constrained to perform by mandamus is found in laws that are "complicated" or simple makes not the slightest difference. The principle is the same. The pension laws are

somewhat complicated; so is the binomial theorem; but when understood they are perfectly plain, and it is the business of the Commissioner of Pensions to understand them. His failure to do so cannot be made a defense to his refusal to perform the duty they enjoin upon him "as the officer of the law," so that he shall "at his discretion sport away the vested rights" of the relator.

I wonder if the laws were "complicated" that prescribed the ministerial duty of the Commissioner of Patents in the case of Butterworth *vs.* Hoe, above referred to? This question is best answered by referring to the case.

Acting upon the opinion of the Attorney General to that effect, the Secretary of the Interior undertook to exercise appellate authority over the Commissioner of Patents and reversed his rulings in favor of the relator. This Court, affirming the judgment of the supreme court of the District of Columbia, held that the Secretary could not under the law review and revise the judgment of the Commissioner of Patents in matters relating to the issuance of patents, and awarded the mandamus, notwithstanding the overruling judgment of the head of the Department. The laws, the interpretation of which were necessarily involved in the case, are of the most "complicated" character; but the opinion of this Court makes them plain and simple. And so it is in the case at bar. The pension laws applicable to the adjudication of the relator's case, when understood, are perfectly plain and simple. They, in plain terms, command a certificate at $25 from June 6, 1866, $31.25 from June 4, 1872, $50 from June 4, 1874, and $72 per month from June 17, 1878. There is no room for judgment nor discretion on the part of the departmental official. "Shall be entitled" is the language of the law.

Again the learned assistant attorney general, and he will pardon me for saying by far more learned in the law relating to real and personal property, commercial paper, equity practice and jurisprudence, &c., than in the laws relating to

the granting of invalid pensions, refers, at page 7 of his brief, to the case of Susan Decatur *vs.* Paulding, Secretary of the Navy, in these words: "The very question that is presented here was settled by this Court in 1840 in Decatur *vs.* Paulding." (14 Pet., 497.)

Before subjecting this case to examination let me first call the attention of the Court to the fact that, applying the principle therein laid down by Chief Justice Taney to the case at bar, the mandamus is bound to issue as prayed for in the petition. At pages 514 and 515 the Chief Justice said: "In the case of Kendall *vs.* The United States (12 "Pet., 524) it was decided in this Court that the circuit "court for Washington county, in the District of Columbia, "has the power to issue a mandamus to an officer of the "Federal Government commanding him to do a ministerial "act. The first question, therefore, to be considered is "whether the duty imposed upon the Secretary of the Navy "by the resolution in favor of Mrs. Decatur was a mere "ministerial act." And then the Chief Justice goes on to show that such duty involves the exercise of judgment and discretion, and continues: "The case before us illustrates "these principles and shows the difference between execu- "tive duties and ministerial acts. The claim of Mrs. Decatur "having been acted upon by his predecessor in office, the "Secretary was obliged to determine whether it was proper "to revise that decision. If he had determined to revise it "he must have exercised his judgment upon the construc- "tion of the law and the resolution, and have made up his "mind whether she was entitled under only one or under "both; and if he determined that she was entitled under "the resolution as well as under the law he must then have "again exercised his judgment in deciding whether the half "pay allowed her was to be calculated by the pay proper or "the pay and emoluments of an officer of the commodore's "rank; and after all this was done he must have inquired "into the condition of the navy pension fund and the claims

"upon it in order to ascertain whether there was money "enough to pay all the demands upon it, and, if not money "enough, how it was to be apportioned among the parties "entitled. A resolution of Congress requiring the exercise "of so much judgment and investigation can with no pro- "priety be said to command a mere ministerial act to be "done by the Secretary." And on the following page his honor further says: "The doctrines which this Court now "hold in relation to the executive departments of the Gov- "ernment are the same that were distinctly announced in "the case of Kendall *vs.* The United States (12 Pet., 524). "On page 610 of that opinion the Court say: 'We do not "'think the proceedings in this case interfere in any respect "'whatever with the rights or duties of the Executive, or "'that it involves any conflict of powers between the exec- "'utive and judicial departments of the Government. The "'mandamus does not seek to direct or control the Post- "'master General in the discharge of any official duty par- "'taking in any respect of an executive character, but to en- "'force the performance of a mere ministerial act, which "'neither he nor the President had any authority to deny "'or control."'

There is but one meaning to this language, and that meaning is that a mandamus will lie in a pension case as well as in any other case to compel the executive officer to perform a duty that is a mere ministerial act.

The case of Susan Decatur *vs.* Paulding, Secretary of the Navy, is this: Congress on March 3, 1837, passed a general pension act giving to the widow of any officer who had died in the naval service the right to receive out of the navy pension fund half the monthly pay to which the deceased officer would have been entitled under the acts regulating the pay in the navy, in force January 1, 1835. On the same day a resolution was adopted by Congress giving to Mrs. Decatur, widow of Captain Stephen Decatur, a pension for

five years out of the navy pension fund, and in conformity with the act of June 30, 1834, and the arrearages of the half pay of a post captain from the death of Commodore Decatur to June 30, 1834. She applied for pension and was pensioned by the predecessor in office of the respondent under the general law; but she claimed a pension also under the resolution, and this claim was referred by Mahlon Dickerson, the then Secretary, to the Attorney General for his opinion whether the claimant was entitled to claim and receive a pension under both the law and the resolution. The opinion was adverse to such right, and the claim for pension under the resolution was accordingly rejected by Secretary Dickerson. When the respondent succeeded to the office of Secretary of the Navy the claim was renewed, and, acting upon the advice of the President, he declined to disturb the adjudication of his predecessor. Thereupon she filed her petition in the old circuit court for mandamus. A wilder case for mandamus than this can be found in the history of this court only in the cases of Brashear *vs* Mason, Secretary of the Navy (6 How., 92), and Goodrich *vs.* Guthrie, Secretary of the Treasury (17 How., 284). All three of these cases are legal absurdities.

The relatrix, Susan Decatur, is presumably the widow of the deceased Commodore, but there is no allegation that the respondent had so found the fact to be from the evidence she had offered, nor is there any allegation that she had never remarried after the decease of her alleged husband. There is no allegation that the respondent or his predecessor in office had finally found all the facts that are necessarily involved to entitle her to a pension under the resolution in her favor, nor that she had been finally adjudged by the respondent or his predecessor to be entitled to a pension under the resolution. All these questions call for proofs, and the finding of facts, in conjunction with the law, involve the exercise of judgment and discretion, and the duty appertaining thereto cannot be controlled by mandamus; so that if we

should eliminate from the case the fact that the relatrix was already pensioned under the general law, a mandamus would not lie to compel the issuance of a certificate under the resolution, upon the case as made by the petition. In order to make the case plain: There are now over three thousand persons on the pension roll under special acts of Congress. A mandamus would not lie in the first instance to compel the Commissioner of Pensions to issue a certificate to any one of these claimants. It is impossible to conceive of a case that does not in its first stage involve the exercise of judgment.

A claimant under a special act must file his claim and prove his identity with the person named in the act, and if the claimant be a widow of a deceased soldier, in addition to this she must prove that she is the widow of the deceased soldier named, and this involves the question of her marriage with the deceased; and then the question arises whether she has remarried since the decease of her former husband. All of this calls for evidence, and the construing of the testimony and the finding of the facts that bring a given case under the very mandate of the law involve the exercise of judgment and discretion which cannot be controlled by a mandamus; but let these questions and all others that are necessarily involved in the adjudication establishing the right be *resolved* in the claimant's favor, then a mandamus will lie to constrain the Commissioner to perform the mere ministerial act the adjudication calls for under the mandatory provisions of the law; and this is the case of Captain Oscar Dunlap.

Now, let us suppose such amendments in the law and the facts in the Decatur *vs.* Paulding case as will bring it on a plane with that of the relator. Let us amend the joint resolution by adding thereto the following words: "The pension hereby provided for the widow of Commodore Decatur shall be in addition to any pension she might be entitled to under the general pension laws but for this resolution, and

the half pay hereby provided shall be deemed to include rations and emoluments as well as pay proper." And let us amend the facts in the case so that it shall appear that the respondent, in the exercise of his functions as Secretary of the Navy, had found and ruled the facts to be that the claimant is the widow of Commodore Decatur, and has by her evidence established her right to a pension under both the general law and the resolution, which we will suppose contained the provisions indicated, but, notwithstanding he has made such adjudication, still refuses to obey the mandate of the law.

Would a mandamus have issued in such a case? Can there be a doubt about the action this Court would have taken had the case been as supposed?

This is the case of the relator. And no ingenuity of argument can make it appear otherwise, if we steadfastly hold to the facts.

The Assistant Attorney General further refers to the cases of Gaines *vs.* Thompson (7 Wall., 347), Commissioner *vs.* Whiteley (4 Wall., 522), Mississippi *vs.* Johnson (4 *Ib.*, 475), and Georgia *vs.* Stanton (6 Wall., 50).

The case of Gaines *vs.* Thompson was for an injunction against the Secretary of the Interior and the Commissioner of the General Land Office to prevent cancellation of a certain entry. The principle is precisely the same as in mandamus, and the case so recognizes the law.

The case of Holloway, Commissioner of Patents, *vs.* Whiteley (4 Wall., 522) was for mandamus. The relator applied, as an assignee, for reissue of patent. The Commissioner decided that he had no such interest as entitled him to a reissue. Mandamus would not lie. The law affords other remedy, namely, by appeal to the supreme court of the District of Columbia.

The case of the State of Mississippi *vs.* Johnson (4 *Ib.*, 475), brought originally in this Court, was a motion in behalf of the State of Mississippi for leave to file a bill in the

name of the State against the President of the United States and General E. O. C. Ord, commanding the district of Mississippi and Arkansas, for a perpetual injunction against executing certain acts of Congress. At page 400 of the opinion, Chief Justice Chase said: "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist and imposed by law."

And the case of the State of Georgia *vs.* Stanton, Secretary of War; General Grant, commanding the armies, and Major General Pope, commanding the third military district, including Georgia (6 Wall., 50), is another political case, the object being to restrain the defendants perpetually from executing certain laws enacted by Congress.

There is nothing in these cases that is against the right of the relator to the relief prayed for.

All the authorities concede that a mandamus will lie, when the party is without other adequate legal remedy, to compel the performance of a mere ministerial act.

That the remaining duty in the relator's case is of this character, that every act which calls for the exercise of judgment and discretion has been performed, is manifest on the face of the case.

I am unable to perceive what the amount in controversy has to do with the case. Mandamus is a special remedial writ, and its office is to enjoin the performance of some act the law requires and not to recover a judgment for money. The thing the relator is in pursuit of in these proceedings is the reissuance of his pension certificate at the rates specifically provided by law. This is what he prays the mandamus for; and I respectfully submit to the Court that he has clearly established his right to the writ.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 5 1888
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES *ex rel.* OSCAR Dunlap, plaintiff in error,
vs.
JOHN C. BLACK, COMMISSIONER OF Pensions.
} No. 991.

BRIEF FOR DEFENDANT IN ERROR.

name of the State against the President of the United States and General E. O. C. Ord, commanding the district of Mississippi and Arkansas, for a perpetual injunction against executing certain acts of Congress. At page 400 of the opinion, Chief Justice Chase said: "A ministerial duty, the perform-" ance of which may in proper cases be required of the head of " a department by judicial process, is one in respect to which " nothing is left to discretion. It is a simple, definite duty, " arising under conditions admitted or proved to exist and " imposed by law."

And the case of the State of Georgia *vs.* Stanton, Secretary of War; General Grant, commanding the armies, and Major General Pope, commanding the third military district, including Georgia (6 Wall., 50), is another political case, the object being to restrain the defendants perpetually from executing certain laws enacted by Congress.

There is nothing in these cases that is against the right of the relator to the relief prayed for.

All the authorities concede that a mandamus will lie, when the party is without other adequate legal remedy, to compel the performance of a mere ministerial act.

That the remaining duty in the relator's case is of this character, that every act which calls for the exercise of judgment and discretion has been performed, is manifest on the face of the case.

I am unable to perceive what the amount in controversy has to do with the case. Mandamus is a special remedial writ, and its office is to enjoin the performance of some act the law requires and not to recover a judgment for money. The thing the relator is in pursuit of in these proceedings is the reissuance of his pension certificate at the rates specifically provided by law. This is what he prays the mandamus for; and I respectfully submit to the Court that he has clearly established his right to the writ.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED
OCT 5 1888
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES *ex rel.* OSCAR Dunlap, plaintiff in error,
vs.
JOHN C. BLACK, COMMISSIONER OF Pensions.
} No. 991.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES *ex rel.* OSCAR Dunlap, plaintiff in error,
vs.
JOHN C. BLACK, COMMISSIONER OF Pensions.
} No. 991.

BRIEF FOR DEFENDANT IN ERROR.

This is an application for a mandamus to compel the Commissioner of Pensions to increase the rate of the relator's pension.

The relator, Oscar Dunlap, was a captain during the late war in the Twenty-sixth Regiment of Illinois Infantry, which was enrolled in the military service of the United States.

On the 28th December, 1864, while in the line of his duty as captain, he received injuries caus-

ing the loss of his right arm below the elbow and his right leg below the knee. At the same time his skull and left jaw were fractured, causing epilepsy and permanent impairment of mind and memory, "whereby," to follow the language of the petition, "he became and now is so totally and permanently disabled as to be rendered totally helpless, or so nearly so as to require regular aid and attendance of another person."

For some time the relator drew a pension only for the loss of his right arm and foot, that is to say, $20 a month from the date of his discharge; $24 a month from 4th June, 1872; and $36 a month from 28th February, 1877.

It never occurred to him or those interested in him that he was entitled to claim a larger pension on account of the almost helpless condition to which the injury to his head had reduced him until he or they were stimulated to do so by the act of 16th June, 1880, which provided as follows:

> That all soldiers and sailors who are now receiving a pension of fifty dollars per month, under the provisions of an act entitled "An act to increase the pension of soldiers and sail-

ors who have been totally disabled," approved June eighteenth, eighteen hundred and seventy-four, shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons, the sum of seventy-two dollars per month.

SEC. 2. All pensioners whose pensions shall be increased by the provisions of this act from fifty dollars per month to seventy-two dollars per month shall be paid the difference between said sums monthly, from June seventeenth, eighteen hundred and seventy-eight, to the time of the taking effect of this act.

On the 26th June, 1880, the relator applied to the Commissioner of Pensions to be admitted to the benefits of this act, and allowed to draw $72 a month, with relation back to 17th June, 1878.

The Commissioner denied the application on the ground that before a party could claim the bounty of the act of 26th June, 1880, he must have been, when that act was approved, an enrolled pensioner under the act of 18th June, 1874, which granted a pension of $50 a month to military persons "so permanently and totally disabled as to require the regular personal aid and attendance of another person," thus describing a class to which the relator belonged. (See §§ 4697, 4698, Rev. Stat.)

But although the relator's application under the act of 1860 failed, the Commissioner of Pen-

sions held that upon the evidence submitted by him he was entitled to the pension of $50 a month granted by the act of 1874, but only from the 25th of May, 1881, the date of the first medical examination had after the filing of relator's application. But the relator contended and now contends that under the laws for the payment of pension arrearages, namely, the acts of 25th January, 1879 (20 Stat., 265), and 3d March, 1879 (20 Stat., 469), his right to the $50 a month should date back to the 4th June, 1874, when the law went into effect.

These are the main grounds of contest, although the relator does claim to go all the way back to the date of his discharge as the initial point of the additional allowance claimed on account of the injury to his head. But it does not appear that there are any rulings of the Pension Bureau adverse to the relator excepting those first mentioned upon the acts of 1874 and 1880.

The court below, seeing nothing in the relator's petition to give him a standing in court, dismissed his petition, *without laying the Commis-*

sioner of Pensions under a rule to show cause (R., p. 9).

The case, then, is before this court without an answer by the Commissioner.

Indeed, the Commissioner of Pensions was not even in court, and the whole proceeding below was *ex parte.*

As the jurisdiction of this court in such cases as this is appellate, the citation can not give jurisdiction over the Commissioner in a case where the court of original jurisdiction had none.

It is only, then, as *amicus curiæ* that the undersigned appears and files this brief.

ARGUMENT.

To support the judgment of the court below it is hardly necessary to do more than state the simple proposition that the object of this writ of error is to ask this court to take the administration of the pension laws out of the hands of the Commissioner of Pensions, where Congress has placed it, and give the relator the benefit of a judicial administration of the pension system. That is the whole case.

The question thus presented has been repeatedly passed upon by this court.

In vain does this court declare that it is not established to correct all the errors and evils that arise in the administration of the Government; that it is only in cases properly presented for judicial cognizance that the national courts can interfere; and that so long as the other departments of the Government are acting within their proper spheres they can not be interfered with by the judicial department.

It is by the Commissioner of Pensions, and not by this court or any other court, that Congress has declared that the pension system shall be administered.

The administration of that system can not be meddled with by the Judicial Department without invading the province of its co-ordinate, the Executive Department.

How, then, can this court settle the question between the relator and the head of the Pension Bureau, as to the construction of the complicated pension laws, without an usurpation of Executive power?

The very question that is presented here was settled by this court in 1840, in Decatur *v.* Paulding (14 Pet., 497).

Mrs. Decatur claimed two pensions, one under a private act of Congress and the other under the general law. It was extremely doubtful what the true construction was. The Secretary of the Navy, Mr. Paulding, who was then charged with the administration of the Navy pension fund, held that Mrs. Decatur could not claim under both laws, but must make her election under which she would claim.

She applied for a mandamus to compel the Secretary of the Navy to pay her both pensions.

After showing that it was the duty of the Secretary to put his own interpretation upon the laws and that his position in that respect involved the exercise of discretion, and could, with no propriety, be called a ministerial act, and was not subject to the revision of any tribunal, the court goes on to say:

> The interference of the courts with the performance of the ordinary duties of the Executive Departments of the Govern-

ment would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them. Upon the very subject before us, the interposition of the courts might throw the pension fund, and the whole subject of pensions, into the greatest confusion and disorder. It is understood from the Secretary's return to the *mandamus*, that in allowing the half-pay, it has always been calculated by the pay proper; and that the rations or emoluments to which the officer was entitled, have never been brought into the calculation. Suppose the court had deemed the act required by the resolution in question a fit subject for a *mandamus*, and, in expounding it, had determined that the rations and emoluments of the officer were to be considered in calculating the half-pay? We can readily imagine the confusion and disorder into which such a decision would throw the whole subject of pensions and half-pay, which now forms so large a portion of the annual expenditure of the Government, and is distributed among such a multitude of individuals (p. 516).

This language of Mr. Chief-Justice Taney may, perhaps, be profitably contrasted with the following, from the petition in case No. 992, signed by the same counsel as signed the petition in this case, namely:

And, finally, your relator represents that the law affords no direct proceeding for the judicial adjudication of the questions herein presented that are constantly arising in the administration of the pension laws; that the proper and rightful interpretation, construction, and administration of those laws in that behalf involve the annual expenditure of large sums of the public treasure of the United States, as well as the private rights, under said laws, of your relator and his comrades in like manner or in equal degree with himself disabled; that for want of such judicial adjudication, interpretation, and construction the most glaring inequalities have sprung up in the matter of the rates of pension, of which the foregoing cases are but a few instances. The attention of the court will be called to numerous other instances in the argument at the hearing of this petition; that in many cases the rate of pension is largely in excess of what the law allows and to the prejudice of the Government, while in others, as for instance, in the case of your relator and his said comrades, the rate allowed is less than that provided by the laws and to the prejudice of the pensioner.

Wherefore, your relator, considering the public interest as well as the private rights of your relator and his comrades involved therein, in the utmost best faith, humbly prays that this honorable court, actuated by the same public considerations that moved the Supreme Court of the United States in that early day to deliver an extra judicial opinion in the case of the United States *ex relatione* William Marbury *vs.* James Madison, Secretary of State, 1 Cranch, 137, may hear your relator's petition and listen to argument thereon respecting the construction and meaning of those provisions of the pension laws hereinbefore particularly specified, and that the court may deliver its opinion, though extrajudicial it be, upon the questions propounded, involving the interpretation, construction, and the true meaning of said provisions, to the end that these salutary laws, enacted for the relief of those persons disabled in the late civil war and in the line of duty may, be impartially administered by the granting of equal pensions for equal disabilities.

In the light, then, of *Decatur* v. *Paulding* and the subsequent cases of *Gaines* v. *Thompson* (7 Wall., 347) *Commissioner* v. *Whitely* (4 Wall., 522), *Mississippi* v. *Johnson* (4 *ib.*, 475), and *Georgia* v. *Stanton* (6 Wall., 50), it would seem too clear for argument that this court has no power to act. On this ground we forbear to discuss any of the questions raised by the relator on the pension laws, and ask that the judgment may be affirmed.

The relator has not made it clear that the amount in controversy is over $5,000.

WM. A. MAURY,
Assistant Attorney-General.

○